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॥ आ नो भद्राः क्रतवो यन्तु विश्वतः ॥
"Let noble thoughts come to us from every side."
Rig Veda

COMPILATION OF
LANDMARK JUDGMENTS
OF
SUPREME COURT OF INDIA
ON
FAMILY MATTERS

It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.

Hon'ble Mr. Justice Dipak Misra
Bhuwan Mohan Singh v. Meena, Cr. App. No. 1331 of 2014,
(2015) 6 SCC 353

Compiled by
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"Lack of concern and Lack of patience, on the part of Family Court Judges, is not expected in present time."

Justice Dipak Misra

COMPILATION OF LANDMARK JUDGMENTS OF SUPREME COURT OF INDIA ON FAMILY MATTERS

Year of Publication : 2016

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SUPREME COURT OF INDIA

Dated : 6TH MAY, 2016

Hon'ble the Chief Justice of India vide order dated 6th May, 2016 has been pleased to reconstitute the **'Committee for sensitization of Family Court Matters'**, comprising the following Hon'ble Judges :-

1. Hon'ble Mr. Justice Dipak Misra
   Judge, Supreme Court of India

2. Hon'ble Mr. Justice Navin Sinha
   Chief Justice, High Court of Chhattisgarh

3. Hon'ble Mr. Justice D.N. Patel
   Judge, High Court of Jharkhand

The concerned PPS/PS may apprise their Lordships about the reconsitution of the Committee.

Sd/-
[Ravindra Maithani]
Secretary General

(i) PPS to Hon'ble Mr. Justice Navin Singh,
Hon'ble Chief Justice, High Court of Chhattisgarh

(ii) PS to Hon'ble Mr. Justice D.N. Patel
Hon'ble Judge, High Court of Jharkhand

PREFACE

JUSTICE D.N. PATEL
Judge, High Court of Jharkhand &
Executive Chairman, Jharkhand State Legal Services Authority

"Only such a householder who practices restraint in taking care of his family shall acquire family happiness and achieve higher social status."

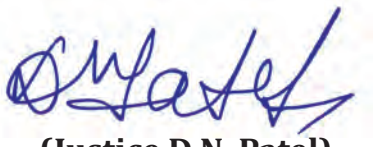
RIG VEDA

Almost everything of lasting value in society has its root in the family. Family disputes have many dimensions: maintenance and alimony, custody of children, visitation rights, marriage & divorce and stridhan. These disputes have potentiality to ruin the innocence of child and esteem of man and woman.

The dispute in family is not uncommon but the speed with which family disputes are reaching courts is a matter of concern. The responsibility of a Family Court Judge is much more than that of other judges. A Family Court judge is not expected to merely record evidence, hear argument and pass judgement. The approach of Family Court judge should be conciliatory.

Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India has said in Voluntary Health Association of Punjab Vs. Union of India [(2013) 4 SCC 1 para 31] that "the innocence of a child and the creative intelligence of a woman can never ever be brushed aside or marginalised. They play a seminal role in the society. Civilisation of a country is known by how it respects its women."

In family disputes the worst sufferer are children and the women and the matters concerning their future are highly sensitive. They should be dealt with equal amount of sensitivity by all stake holders. The family is the foundation of society and a dispute in family has its impact on the society also. A Family Court Judge should be aware of human behaviour. Likewise, the role of Mediators and Counsellors is also important. Therefore, this is an effort to compile the landmark judgements of Supreme Court of India on almost all subjects of family courts for guiding and assisting all the stake holders. The sensitisation of all the stake holders of family court matters is the need of the hour.



(Justice D.N. Patel)

वेदमनूच्य आचर्योऽन्तेवासिनमनुशास्ति। सत्यं वद। धर्मं चर। स्वाध्यायान्मा प्रमदः।
आचार्याय प्रियं धनमाहृत्य प्रजातन्तुम् मा व्यवच्छेत्सीः। सत्यान्न प्रमथितव्यं।
धर्मान्न प्रमथितव्यं। कुशलान्न प्रमथितव्यं। स्वध्यायप्रवचनाब्याम् न प्रमथितव्यं।
देवपितृकार्यान्न प्रम्थितव्यं्। मातृदेवो भव। पितृ देवो भव। आचार्यदेवो भव। अतिथिदेवो भव।
यान्यनवद्यानि कर्माणि। तानि सेवितव्यानि। नो इतराणि। यान्यस्माकं सुचरितानि।
तानि त्वयोपास्यानि नो इतराणि।

"Speak the Truth..
Follow the ordained conduct.
Never develop indifference to the reciting and study of the scriptures.
At the time of departure, it is your bounden duty to offer the gift which the preceptor likes most.
Go ahead and marry in the appropriate way so that your family lineage is not broken.
Never fail to pay attention to whatever truth is spoken to you.
Never fail to perform the duty ordained to you.
Never be careless about the things which are proper and good for you.
Never shy away from propagating and teaching what you have learned.
You should never be negligent in offering to the gods and the manes (departed elders in the family line) what is expected to you.
Let your mother be GOD to you.
Let your father be GOD to you.

तैत्तरीय उपनिषद् शिक्षावली 11 भागः

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LANDMARK JUDGMENTS ON

STRIDHAN

KRISHNA BHATACHARJEE VS. SARATHI CHOUDHURY

2015 Supreme Court Cases OnLine SC 1229

(Before Hon'ble Mr. Justice Dipak Misra and Hon'ble Mr. Justice Prafulla C. Pant. JJ.)

Krishna Bhatacharjee ... Appellant
Versus
Sarathi Choudhury and Anr. ... Respondents

Criminal Appeal No. 1545 of 2015 (@ SLP(Crl) No. 10223 OF 2014)

Decided on November 20, 2015

... Stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family.

.... It is always a question of fact in each case as to how the property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom.

The Judgment of the Court was delivered by

Dipak Misra, J. — Leave granted.

2. The appellant having lost the battle for getting her Stridhan back from her husband, the first respondent herein, before the learned Magistrate on the ground that the claim preferred under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, 'the 2005 Act') was not entertainable as she had ceased to be an "aggrieved person" under Section 2(a) of the 2005 Act and further that the claim as put forth was barred by limitation; preferred an appeal before the learned Additional Sessions Judge who concurred with the view expressed by the learned Magistrate, and being determined to get her lawful claim, she, despite the repeated non-success, approached the High Court of Tripura, Agartala in Criminal Revision No. 19 of 2014 with the hope that she will be victorious in the war to get her own property, but the High Court, as is perceivable, without much analysis, declined to interfere by passing an order with Spartan austerity possibly thinking lack of reasoning is equivalent to a magnificent virtue and that had led the agonised and perturbed wife to prefer the present appeal, by special leave.

3. Prior to the narration of facts which are essential for adjudication of this appeal, we may state that the 2005 Act has been legislated, as its Preamble would reflect, to provide for more effective protection of the rights of the women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The 2005 Act is a detailed Act. The dictionary clause of the 2005 Act, which we shall advert to slightly at a later stage, is in a broader spectrum. The definition of "domestic violence" covers a range of violence which takes within its sweep "economic abuse" and the words "economic abuse", as the provision would show, has many a facet.

4. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts where under the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. It should be borne in mind that helpless and hapless "aggrieved person" under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct. The principle "justice to the cause is equivalent to the salt of ocean" should be kept in mind. The court of law is bound to uphold the truth which sparkles when justice is done. Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence.

5. Presently to the narration of the facts. The marriage between the appellant and the respondent No. 1 was solemnised on 27.11.2005 and they lived as husband and wife. As the allegations proceed, there was demand of dowry by the husband including his relatives and, demands not being satisfied, the appellant was driven out from the matrimonial home. However, due to intervention of the elderly people of the locality, there was some kind of conciliation as a consequence of which both the husband and the wife stayed in a rented house for two months. With the efflux of time, the husband filed a petition seeking judicial separation before the Family Court and eventually the said prayer was granted by the learned Judge, Family Court. After the judicial separation, on 22.5.2010 the appellant filed an application under Section 12 of the 2005 Act before the Child Development Protection Officer (CDPO), O/O the District Inspector, Social Welfare & Social Education, A.D. Nagar, Agartala, Tripura West seeking necessary help as per the provisions contained in the 2005 Act. She sought seizure of Stridhan articles from the possession of the husband. The application which was made before the CDPO was forwarded by the said authority to the learned Chief Judicial Magistrate, Agartala Sadar, West Tripura by letter dated 1.6.2010. The learned Magistrate issued notice to the respondent who filed his written objections on 14.2.2011.

6. Before the learned Magistrate it was contended by the respondent that the application preferred by the wife was barred by limitation and that she could not have raised claim as regards Stridhan after the decree of judicial separation passed by the competent court. The learned Magistrate taking into consideration the admitted fact that respondent and the appellant had entered into wedlock treated her as an "aggrieved person", but opined that no "domestic relationship" as defined under Section 2(f) of the 2005 Act existed between the parties and, therefore, wife was not entitled to file the application under Section 12 of the 2005 Act. The learned Magistrate came to hold that though the parties had not been divorced but the decree of judicial separation would be an impediment for entertaining the application and being of this view, he opined that no domestic relationship subsisted under the 2005 Act and hence, no relief could be granted. Be it stated here that before the learned Magistrate, apart from herself, the appellant examined three witnesses and the husband had examined himself as DW-1. The learned Magistrate while

dealing with the maintainability of the petition had noted the contentions of the parties as regards merits, but has really not recorded any finding thereon.

7. The aggrieved wife preferred criminal appeal No. 6(1) of 2014 which has been decided by the learned Additional Sessions Judge, Agartala holding, inter alia, that the object of the 2005 Act is primarily to give immediate relief to the victims; that as per the decision of this Court in ***Inderjit Singh Grewal v. State of Punjab***[1] that Section 468 of the Code of Criminal Procedure applies to the proceedings under the 2005 Act and, therefore, her application was barred by time. Being of this view, the appellate court dismissed the appeal.

8. On a revision being preferred, the High Court, as is demonstrable from the impugned order, after referring to the decision in Inderjit Singh Grewal (supra), has stated that the wife had filed a criminal case under Section 498(A) IPC in the year 2006 and the husband had obtained a decree of judicial separation in 2008, and hence, the proceedings under the 2005 Act was barred by limitation. That apart, it has also in a way expressed the view that the proceedings under the 2005 Act was not maintainable.

9. In our prefatory note, we have stated about the need of sensitive approach to these kinds of cases. There can be erroneous perception of law, but as we find, neither the learned Magistrate nor the appellate court nor the High Court has made any effort to understand and appreciate the stand of the appellant. Such type of cases and at such stage should not travel to this Court. We are compelled to say so as we are of the considered opinion that had the appellate court and the High Court been more vigilant, in all possibility, there could have been adjudication on merits. Be that as it may.

10. The facts that we have enumerated as regards the "status of the parties", "judicial separation" and "the claim for Stridhan" are not in dispute. Regard being had to the undisputed facts, it is necessary to appreciate the scheme of the 2005 Act. Section 2(a) defines "aggrieved person" which means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent. Section 2(f) defines "domestic relationship" which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Section 2(g) defines the term "domestic violence" which has been assigned and given the same meaning as in Section 3. Sub-section (iv) of Section 3 deals with "economic abuse". As in the facts at hand, we are concerned with the "economic abuse", we reproduce Section 3(iv) which reads as follows:-

> ***"Section 3. Definition of domestic violence.***
>
> *(iv) "economic abuse" includes-*
>
> *(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;*

1 (2011) 12 SCC 588

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

Explanation II.-For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration."

11. Section 8(1) empowers the State Government to appoint such number of Protection Officers in each district as it may consider necessary and also to notify the area or areas within which a Protection Officer shall exercise the powers and perform the duties conferred on him by or under the 2005 Act. The provision, as is manifest, is mandatory and the State Government is under the legal obligation to appoint such Protection Officers. Section 12 deals with application to Magistrate. Sub-sections (1) and (2) being relevant are reproduced below:-

"Section 12. Application to Magistrate.-(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act: Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent: Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off."

12. Section 18 deals with passing of protection orders by the Magistrate. Section 19 deals with the residence orders and Section 20 deals with monetary reliefs. Section 28 deals with procedure and stipulates that all proceedings under Sections 12, 18, 19, 20, 21, 22 and 23 and offences under Section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. Section 36 lays down that the provisions of the 2005 Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

13. Having scanned the anatomy of the 2005 Act, we may now refer to a few decisions of this Courts that have dealt with the provisions of the 2005 Act. In ***V.D. Bhanot v. Savita Bhanot***[2] the question arose whether the provisions of the 2005 Act can be made applicable in relation to an incident that had occurred prior to the coming into force of the said Act. Be it noted, the High Court had rejected the stand of the respondent therein that the provisions of the 2005 Act cannot be invoked if the occurrence had taken place prior to the coming into force of the 2005 Act. This Court while dealing with the same referred to the decision rendered in the High Court which after considering the constitutional safeguards under Article 21 of the Constitution vis-à-vis the provisions of Sections 31 and 33 of the 2005 Act and after examining the Statement of Objects and Reasons for the enactment of the 2005 Act, had held that it was with the view of protecting the rights of women under Articles 14, 15 and 21 of the Constitution that Parliament enacted the 2005 Act in order to provide for some effective protection of rights guaranteed under the Constitution to women, who are victims of any kind of violence occurring within the family and matters connected therewith and incidental thereto, and to provide an efficient and expeditious civil remedy to them and further that a petition under the provisions of the 2005 Act is maintainable even if the acts of domestic violence had been committed prior to the coming into force of the said Act, notwithstanding the fact that in the past she had lived together with her husband in a shared household, but was no more living with him, at the time when the Act came into force. After analyzing the verdict of the High Court, the Court concurred with the view expressed by the High Court by stating thus:-

> *"We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005."*

14. In ***Saraswathy v. Babu***[3] a two-Judge Bench, after referring to the decision in *V.D. Bhanot* (supra), reiterated the principle. It has been held therein:-

> *"We are of the view that the act of the respondent husband squarely comes within the ambit of Section 3 of the DVA, 2005, which defines "domestic violence" in wide terms. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the DVA, 2005 cannot be taken into consideration while passing an order. This is a case where the respondent husband has not complied with the order and direction passed by the trial court and the appellate court. He also misleads the Court by giving wrong statement before the High Court in the contempt petition filed by the appellant wife. The appellant wife having being harassed since 2000 is entitled for protection order and residence order under Sections 18 and 19 of the DVA, 2005 along with the maintenance as allowed by the trial court under Section 20(1)(d) of the DVA, 2005. Apart from these reliefs, she is also entitled for compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent husband. Therefore, in addition to the reliefs granted by the courts below, we are of the view*

2 (2012) 3 SCC 183
3 (2014) 3 SCC 712

that the appellant wife should be compensated by the respondent husband. Hence, the respondent is hereby directed to pay compensation and damages to the extent of Rs 5,00,000 in favour of the appellant wife."

15. In the instant case, as has been indicated earlier, the courts below as well as the High Court have referred to the decision in Inderjit Singh Grewal (supra). The said case has to be understood regard being had to the factual exposè therein. The Court had referred to the decision in ***D. Velusamy v. D. Patchaiammal***[4] wherein this Court had considered the expression "domestic relationship" under Section 2(f) of the Act and judgment in Savitaben ***Somabhai Bhatiya v. State of Gujarat***[5] and distinguished the said judgments as those cases related to live-in relationship without marriage. The Court analyzing the earlier judgments opined that the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage. The said judgments were distinguished on facts as those cases related to live-in relationship without marriage. The Court opined that the parties therein had got married and the decree of the civil court for divorce subsisted and that apart a suit to declare the said judgment and decree as a nullity was still pending consideration before the competent court. In that background, the Court ruled that:-

"In the facts and circumstances of the case, the submission made on behalf of Respondent 2 that the judgment and decree of a civil court granting divorce is null and void and they continued to be the husband and wife, cannot be taken note of at this stage unless the suit filed by Respondent 2 to declare the said judgment and decree dated 20-3-2008 is decided in her favour. In view thereof, the evidence adduced by her particularly the record of the telephone calls, photographs attending a wedding together and her signatures in school diary of the child cannot be taken into consideration so long as the judgment and decree of the civil court subsists. On a similar footing, the contention advanced by her counsel that even after the decree of divorce, they continued to live together as husband and wife and therefore the complaint under the 2005 Act is maintainable, is not worth acceptance at this stage."

[Emphasis supplied]

16. It may be noted that a submission was advanced by the wife with regard to the applicability of Section 468 CrPC. While dealing with the submission on the issue of limitation, the Court opined:-

"..... in view of the provisions of Section 468 CrPC, that the complaint could be filed only within a period of one year from the date of the incident seem to be preponderous in view of the provisions of Sections 28 and 32 of the 2005 Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006 which make the provisions of CrPC applicable and stand fortified by the judgments of this Court in ***Japani Sahoo v. Chandra Sekhar Mohanty,*** *(2007) 7 SCC 394, and* ***NOIDA Entrepreneurs Assn. v. NOIDA****, (2011) 6 SCC 508."*

17. As it appears, the High Court has referred to the same but the same has really not been adverted. In fact, it is not necessary to advert to the said aspect in the present case.

4 (2010) 10 SCC 46
5 (2005) 3 SCC 636

18. The core issue that is requisite to be addressed is whether the appellant has ceased to be an "aggrieved person" because of the decree of judicial separation. Once the decree of divorce is passed, the status of the parties becomes different, but that is not so when there is a decree for judicial separation. A three-Judge Bench in ***Jeet Singh and Others Vs. State of U.P.***[6] though in a different context, adverted to the concept of judicial separation and ruled that the judicial separation creates rights and obligations. A decree or an order for judicial separation permits the parties to live apart. There would be no obligation for either party to cohabit with the other. Mutual rights and obligations arising out of a marriage are suspended. The decree however, does not sever or dissolve the marriage. It affords an opportunity for reconciliation and adjustment. Though judicial separation after a certain period may become a ground for divorce, it is not necessary and the parties are not bound to have recourse to that remedy and the parties can live keeping their status as wife and husband till their lifetime.

19. In this regard, we may fruitfully refer to the authority in ***Hirachand Srinivas Managaonkar v. Sunanda***[7] wherein the issue that arose for determination was whether the husband who had filed a petition seeking dissolution of the marriage by a decree of divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 can be declined relief on the ground that he had failed to pay maintenance for his wife and daughter despite an order of the court. The husband was appellant before this Court and had filed an application under Section 10 of the Hindu Marriage Act, 1955 for seeking judicial separation on the ground of adultery on the part of the appellant. Thereafter, the appellant presented the petition for dissolution of marriage by decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of more than one year after passing of the decree for judicial separation. The stand of the wife was that the appellant having failed to pay the maintenance as ordered by the court, the petition for divorce filed by the husband was liable to be rejected inasmuch he was trying to get advantage of his own wrong for getting the relief. The High Court accepted the plea of the wife and refused to grant the prayer of the appellant seeking divorce. It was contended before this Court that the only condition for getting divorce under Section 13(1-A)(i) of the Hindu Marriage Act, 1955 is that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after the passing of the decree for judicial separation in a proceeding to which both the spouses are parties. It was urged that if the said condition is satisfied the court is required to pass a decree of divorce. On behalf of the wife, the said submissions were resisted on the score that the husband had been living in continuous adultery even after passing of the decree of judicial separation and had reasonably failed to maintain the wife and daughter. The Court proceeded to analyse Section 13(1-A)(i) of the Hindu Marriage Act, 1955. Analysing the provisions at length and speaking about judicial separation, it expressed that after the decree for judicial separation was passed on the petition filed by the wife it was the duty of both the spouses to do their part for cohabitation. The husband was expected to act as a dutiful husband towards the wife and the wife was to act as a devoted wife towards the husband. If this concept of both the spouses making sincere contribution for the purpose of successful cohabitation after a judicial separation is ordered then it can reasonably be said that in the facts and circumstances of the case the husband in refusing to pay maintenance to the wife failed to act as a husband. Thereby he committed a "wrong" within the meaning of Section 23 of

6 (1993) 1 SCC 325
7 (2001) 4 SCC 125

the Act. Therefore, the High Court was justified in declining to allow the prayer of the husband for dissolution of the marriage by divorce under Section 13(1-A) of the Act.

20. And, the Court further stated thus:-

> *"... The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and readjustment. The decree may fall by a conciliation of the parties in which case the rights of the respective parties which float from the marriage and were suspended are restored. Therefore the impression that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."*

21. It is interesting to note that an issue arose whether matrimonial offence of adultery had exhausted itself when the decree for judicial separation was granted and, therefore, it cannot be said that it is a new fact or circumstance amounting to wrong which will stand as an obstacle in the way of the husband to obtain the relief which he claims in the divorce proceedings. Be it stated that reliance was placed on the decision of Gujarat High Court in ***Bai Mani v. Jayantilal Dahyabhai***[8]. This Court did not accept the contention by holding that living in adultery on the part of the husband is a continuing matrimonial offence, and it does not get frozen or wiped out merely on passing of a decree for judicial separation which merely suspends certain duties and obligations of the spouses in connection with their marriage and does not snap the matrimonial tie. The Court ruled that the decision of the Gujarat High Court does not lay down the correct position of law. The Court approved the principle stated by the Madras High Court in the case of ***Soundarammal v. Sundara Mahalinga Nadar***[9] in which a Single Judge had taken the view that the husband who continued to live in adultery even after decree at the instance of the wife could not succeed in a petition seeking decree for divorce and that Section 23(1)(a) barred the relief.

22. In view of the aforesaid pronouncement, it is quite clear that there is a distinction between a decree for divorce and decree of judicial separation; in the former, there is a severance of status and the parties do not remain as husband and wife, whereas in the latter, the relationship between husband and wife continues and the legal relationship continues as it has not been snapped. Thus understood, the finding recorded by the courts below which have been concurred by the High Court that the parties having been judicial separated, the appellant wife has ceased to be an "aggrieved person" is wholly unsustainable.

23. The next issue that arises for consideration is the issue of limitation. In the application preferred by the wife, she was claiming to get back her stridhan. Stridhan has been described as saudayika by Sir Gooroodas Banerjee in "Hindu Law of Marriage and Stridhan" which is as follows:-

8 AIR 1979 Guj 209
9 AIR 1980 Mad 294

"First, take the case of property obtained by gift. Gifts of affectionate kindred, which are known by the name of saudayika stridhan, constitute a woman's absolute property, which she has at all times independent power to alienate, and over which her husband has only a qualified right, namely, the right of use in times of distress."

24. The said passage, be it noted, has been quoted ***Pratibha Rani v. Suraj Kumar and Another***[10]. In the said case, the majority referred to the stridhan as described in "Hindu Law" by N.R. Raghavachariar and Maine's "Treatise on Hindu Law". The Court after analyzing the classical texts opined that:-

"It is, therefore, manifest that the position of stridhan of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes — she may spend the whole of it or give it away at her own pleasure by gift or will without any reference to her husband. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilise it but he is morally bound to restore it or its value when he is able to do so. It may be further noted that this right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt."

25. In the said case, the Court ruled:-

"... a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the said articles as and when demanded by the wife nor can he burden her with losses of business by using the said property which was never intended by her while entrusting possession of stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under Section 406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only a custodian of the stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property."

26. The decision rendered in the said case was referred for a fresh look by a three-Judge Bench. The three-Judge Bench ***Rashmi Kumar (Smt) v. Mahesh Kumar Bhada***[11] while considering the issue in the said case, ruled that :-

"9. A woman's power of disposal, independent of her husband's control, is not confined to saudayika but extends to other properties as well. Devala says: "A woman's maintenance (vritti), ornaments, perquisites (sulka), gains (labha), are her stridhana. She herself has the exclusive right to enjoy it. Her husband has no right to use it except in distress…." In N.R. Raghavachariar's Hindu Law — Principles and Precedents, (8th Edn.) edited by Prof. S. Venkataraman, one of the renowned Professors of Hindu Law para 468 deals with "Definition of Stridhana". In para 469 dealing with "Sources of acquisition" it is stated that the sources of acquisition of property in a woman's possession are: gifts

10 (1985) 2 SCC 370
11 (1997) 2 SCC 397

before marriage, wedding gifts, gifts subsequent to marriage etc. Para 470 deals with "Gifts to a maiden". Para 471 deals with "Wedding gifts" and it is stated therein that properties gifted at the time of marriage to the bride, whether by relations or strangers, either Adhiyagni or Adhyavahanika, are the bride's stridhana. In para 481 at page 426, it is stated that ornaments presented to the bride by her husband or father constitute her Stridhana property. In para 487 dealing with "powers during coverture" it is stated that saudayika meaning the gift of affectionate kindred, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will she is the absolute owner and can deal with it in any way she likes. She may spend, sell or give it away at her own pleasure.

10. It is thus clear that the properties gifted to her before the marriage, at the time of marriage or at the time of giving farewell or thereafter are her stridhana properties. It is her absolute property with all rights to dispose at her own pleasure. He has no control over her stridhana property. Husband may use it during the time of his distress but nonetheless he has a moral obligation to restore the same or its value to his wife. Therefore, stridhana property does not become a joint property of the wife and the husband and the husband has no title or independent dominion over the property as owner thereof."

27. After so stating the Court proceeded to rule that stridhana property is the exclusive property of the wife on proof that she entrusted the property or dominion over the stridhana property to her husband or any other member of the family, there is no need to establish any further special agreement to establish that the property was given to the husband or other member of the family. Further, the Court observed that it is always a question of fact in each case as to how the property came to be entrusted to the husband or any other member of the family by the wife when she left the matrimonial home or was driven out therefrom. Thereafter, the Court adverted to the concept of entrustment and eventually concurred with the view in the case of Pratibha Rani (supra). It is necessary to note here that the question had arisen whether it is a continuing offence and limitation could begin to run everyday lost its relevance in the said case, for the Court on scrutiny came to hold that the complaint preferred by the complainant for the commission of the criminal breach of trust under Section 406 of the Indian Penal Code was within limitation.

28. Having appreciated the concept of Stridhan, we shall now proceed to deal with the meaning of "continuing cause of action". In ***Raja Bhadur Singh v. Provident Fund Inspector and Others***[12] the Court while dealing with the continuous offence opined that the expression "continuing offence" is not defined in the Code but that is because the expressions which do not have a fixed connotation or a static import are difficult to define. The Court referred to the earlier decision in ***State of Bihar v. Deokaran Nenshi***[13] and reproduced a passage from the same which is to the following effect:-

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or

12 (1984) 4 SCC 222
13 (1972) 2 SCC 890

complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

29. The Court further observed :-

"This passage shows that apart from saying that a continuing offence is one which continues and a non-continuing offence is one which is committed once and for all, the Court found it difficult to explain as to when an offence can be described as a continuing offence. Seeing that difficulty, the Court observed that a few illustrative cases would help to bring out the distinction between a continuing offence and a non-continuing offence. The illustrative cases referred to by the Court are three from England, two from Bombay and one from Bihar."

30. Thereafter, the Court referred to the authorities and adverted to *Deokaran Nenshi* (supra) and eventually held:-

"The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence..."

31. Regard being had to the aforesaid statement of law, we have to see whether retention of stridhan by the husband or any other family members is a continuing offence or not. There can be no dispute that wife can file a suit for realization of the stridhan but it does not debar her to lodge a criminal complaint for criminal breach of trust. We must state that was the situation before the 2005 Act came into force. In the 2005 Act, the definition of "aggrieved person" clearly postulates about the status of any woman who has been subjected to domestic violence as defined under Section 3 of the said Act. "Economic abuse" as it has been defined in Section 3(iv) of the said Act has a large canvass. Section 12, relevant portion of which have been reproduced hereinbefore, provides for procedure for obtaining orders of reliefs. It has been held in *Inderjit Singh Grewal* (supra) that Section 498 of the Code of Criminal Procedure applies to the said case under the 2005 Act as envisaged under Sections 28 and 32 of the said Act read with Rule 15(6) of the Protection of Women from Domestic Violence Rules, 2006. We need not advert to the same as we are of the considered opinion that as long as the status of the aggrieved person remains and stridhan remains in the custody of the husband, the wife can always put forth her claim under Section 12 of the 2005 Act. We are disposed to think so as the status between the parties is not severed because of the decree of dissolution of marriage. The concept of "continuing offence" gets attracted from the date of deprivation of stridhan, for neither the husband nor any other family members can have any right over the stridhan and they remain the custodians. For the purpose of the 2005 Act, she can submit an application to the Protection Officer for one or more of the reliefs under the 2005 Act. In the present case, the wife had submitted the application on 22.05.2010 and the said authority had forwarded the same on 01.06.2010. In the application, the wife had mentioned that the husband had stopped payment of monthly maintenance from

January 2010 and, therefore, she had been compelled to file the application for stridhan. Regard being had to the said concept of "continuing offence" and the demands made, we are disposed to think that the application was not barred by limitation and the courts below as well as the High Court had fallen into a grave error by dismissng the application being barred by limitation.

32. Consequently, the appeal is allowed and the orders passed by the High Court and the courts below are set aside. The matter is remitted to the learned Magistrate to proceed with the application under Section 12 of the 2005 Act on merits.

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LANDMARK JUDGMENTS ON

GENDER JUSTICE

CHARU KHURANA V. UNION OF INDIA

IN THE SUPREME COURT OF INDIA

(2015) 1 Supreme Court Cases 192
(Before Hon'ble Mr. Justice Dipak Misra & Hon'ble Mr. Justice Uday Umesh Lalit, JJ)

Charu Khurana & Others ... Petitioner(s)
Versus
Union of India & Others ... Respondent(s)

Writ Petition (C) No. 78 of 2013†,

decided on November 10, 2014

Constitution of India — Arts. 39-A(d) and 51-A(e) & (j) — Directive principles and fundamental duties — Duty of State to direct its policies towards securing that all citizens, men and women equally, have the right to adequate means of livelihood — Dignity of women, gender equality and justice — Attainment of — Duty of citizens and collective duty of State E.
International Law — Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 — Art. 11(1) — Rights of women — Elimination of discrimination against women in employment — CEDAW advocates the application of same criteria for selection in matters of employment and all steps to be taken to eliminate discrimination against women in the field of employment in order to ensure equality among man and woman — Regarded as the Bill of Rights for women — Equality principles reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995 — India is a party to this Convention and other declarations and is committed to actualise them — Constitution of India, Arts. 15 and 50

Constitution of India — Art. 21 — Right to life and livelihood — Scope — Cine Costume Make-up Artists and Hair Dressers Association, a registered trade union in Maharashtra — Bye-laws prescribing membership of Association shall comprise of make-up men, costume men, and hair dressers (both men and women) — Women not permitted to work as make-up artists — Held, offends Art. 21, dealing with right to livelihood and, is against fundamental human rights — Such discrimination in access to employment and to be considered for employment unless some justifiable riders are attached to it, cannot withstand scrutiny — A clause in the bye-laws of a trade union, which calls itself an association, which is accepted by the statutory authority, cannot play foul of Art. 21 — Cl. 4 of bye-laws also violates S. 21 ,of the Trade Unions Act, 1926 which has not made any distinction between men and women — Trade Unions Act, 1926, Ss. 5, 6,10, 21 and 21-A

The Judgement of the Court was delivered by

Dipak Misra, J. —The present writ petition preferred under Article 32 of the Constitution of India, exposes with luminosity the prevalence of gender inequality in the film industry, which compels one to contemplate whether the fundamental conception of gender empowerment and gender justice have been actualised despite number of legislations and progressive outlook in society or behind the liberal exterior, there is a façade which gets uncurtained on apposite discernment. The stubbornness of the 5th respondent, Cine Costume Make-up Artists and Hair Dressers Association (for short, "Association") of

Mumbai, as is manifest, thought it appropriate to maintain its pertinacity, possibly being determined not to give an inch to the petitioners who are qualified make-up artists by allowing them to become make- up artists as members of the Association on two grounds, namely, they are women and have not remained in the State of Maharashtra for a span of five years. The first ground indubitably offends the concept of gender justice. As it appears though there has been formal removal of institutionalized discrimination, yet the mindset and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of discrimination and prejudice. The days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should have been a matter of history, but it has not been so, as it seems.

2. Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the rights of women and claiming equal treatment. Initially, in the West, it was a fight to get the right to vote and the debate was absolutely ineffective and, in a way, sterile. In 1792, in England, Mary Wollstonecraft in "*A Vindication of the Rights of Women*" advanced a spirited plea for claiming equality for, "the Oppressed half of the Species". In 1869, "*In Subjection of Women*" John Stuart Mill stated, "the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other". On March 18, 1869 Susan B. Anthony proclaimed "Join the union girls, and together say, "Equal pay, for Equal work". The same personality again spoke in July 1871: "Women must not depend upon the protection of man but must be taught to protect themselves".

3. Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American Man of Letters, stated "A sufficient measure of civilization is the influence of the good women". Speaking about the democracy in America, Alexa De Tocqueville wrote thus: "If I were asked .... to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women". One of the greatest Germans has said: "The Eternal Feminine draws us upwards".

4. Lord Denning in his book *Due Process of Law* has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom - develop her personality to the full – as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

5. At one point, the U.N. Secretary General, Kofi Annan, had stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

6. Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."

7. At this juncture, we may refer to some international conventions and treaties on gender equality. The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights.

8. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this Convention and other Declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus: -

> *"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The World Conference on Human Rights urges governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection of human rights of women and the girl child." (Emphasis supplied)*

9. The other relevant International Instruments on Women are : (i) Universal Declaration of Human Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

10. In ***Valsamma Paul (Mrs) v. Cochin University***[1], a two-Judge Bench observed thus: (SCC pp. 562-63, para 26)

> *"Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth — cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the UNO on 18-12-1979 and the Government of India had ratified as an active participant on 19-6-1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity."*

11. Article 1 of CEDAW reads as follows:

> *"1. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex*

1 (1996) 3 SCC 545 : 1996 SCC (L&S) 772: (1996) ATC 713

which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

12. Sub Article (1) of Article 11 of the Convention, which has its own signification, is as follows:

"11. (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."

13. On a perusal of the Articles of the aforesaid Convention, it is clear as crystal that apart from right to work being an inalienable right of all human beings, it has commended the right to same employment opportunity, including the application of same criteria for selection in matters of employment and all steps to be taken to eliminate discrimination against women in the field of employment in order to ensure equality among man and woman. It is founded on social security and many other facets.

14. In ***Madhu Kishwar v. State of Bihar***[2], this Court had stated that Indian women have suffered and are suffering discrimination in silence. A poignant line reads thus:(SCC p.148, Para 28)

"28. … Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination." (SCC p. 148, para 28)

15. In ***Voluntary Health Assn. of Punjab v. Union of India***[3], it has been observed that: (SCC p. 10 para 20)

"20. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilised. In the first part of the last century Swami Vivekanand had said:

2 (1996) 5 SCC 125
3 (2013) 4 SCC 1

"Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."

16. In the aforesaid backdrop, we are required to scrutinise the factual exposition and the relief sought. The petitioner no.1 is a Hollywood trained Make-up Artist and Hair Stylist and on 10.01.2009, she submitted an application to the respondent no.5-Association to issue her a membership card as a Make-up Artist and Hair Stylist. She was not allowed to have a card and she was compelled to delete the word Make-up Artist from her application and to apply only as a Hair Dresser. Under this situation, she sent a complaint on 09.07.2009 to many authorities that she was being deprived to work as a make-up artist and in her complaint she mentioned that when she was found working as a make-up artist, she was slapped with a fine of Rs.26,500/-. Being aggrieved by the action, the petitioner no.1 filed a complaint with the 6th respondent, Federation of Western India Cine Employees (for short, "the Federation"). The respondent no.6, in its turn, sent a communication on 10.07.2009 requiring the 5th respondent to explain the reasons for refusal of membership of the petitioner no.1 as a make-up artist. The other female artists also sent similar complaints to the 6th respondent.

17. As the facts would unfurl, on receipt of the letter dated 10.7.2009 from the respondent no.6, the 5th respondent sent a reply on 01.08.2009. It reads as follows:

"To
Hon'ble General Secretary, Federation of Western India Cine Employees,
Andheri (West),
Mumbai.

Sir,

Ref:- Your letter bearing Ref. No.FWICE/CCMA/670/2009 Date 10/7/2009.

We are in receipt of your aforesaid letter and in response hereto, we would like to write to you as under:-

1. The complaint made by Charu Khurana is totally incorrect. She had desired to have two cards, viz. Make-up artist Card and Hair-dresser's card. She was duly informed that there was no system of issuing two cards simultaneously. On being appraised of the said position, she of her own deleted the words "Make-up artist" in her application and counter-signed the same and had agreed to apply and take only hair Dresser's card. This is evident from the copy of the application made by Charu Khurana. A copy of the said application is enclosed herewith for your immediate reference.

2. Insofar as the allegations of alleged discrimination and not issuing of cards to female members as make-up artist, are concerned, it is stated that make-up artist cards are issued only to male members from the date of formation of the Association, no make-up artist card has been issued to female members till date. This is done to ensure that male members are not deprived of working as make-up artists. If the female members are given make-up artist card then it will become impossible for the male members to get work as in make-up artists and they will lose their sources of livelihood and will be deprived of their earnings to support themselves and their families because no one would be interest to engage the services of a male make-up artist if the female make-up artists are available, looking to the human tendency. It would be appropriate to writ to

you that so far as hair dressers cards are concerned, that is exclusively given to females and never not issued to male members at all.

There is absolutely no question of discrimination practiced by us and everybody is given equal opportunity to earn their livelihood by exploiting their best talents."

18. After the receipt of the said letter, the 6th respondent sent a communication dated 12.08.2009 to respondent no.5 stating, inter alia, as follows:

"Here we would like to remind you that the FWICE is non-political organisation which does not allow any discrimination on the basis of religion, caste, community, gender etc. As such, the Gender Discrimination Policy followed by your association against Female Make-up Artistes as mentioned above, is in direct conflict with the basis Aims and Objects of the FWICE, and is a clear act of violation of the Constitution of India and several other laws in force, and also of the FWICE Constitution, and is against the interests of FWICE. Consequently, please be informed that in view of innumerable earlier directives and resolutions from FWICE and AIFCE in the said matter of membership to female make-up artist, we have no other option but to give our permission to Ms. Charu Khurana to work as a make-up artist in Films/TV Serials/Music Albums/ad films till she gets regular membership of your Association.

Please note that our said permission shall be valid for all regions affiliated to the All India Film Employees Confederation (AIFEC)"

19. In view of the aforesaid communication, the respondent no.6 vide letter dated 4.9.2009 granted permission to petitioner no.1 to work as Make-up artist in Cine Films/ TV serials etc. till she gets regular membership and this permission was valid for all the regions affiliated to the All India Film Employees Confederation. Thereafter, the 5th respondent intimated the Federation that the decision taken by it was not binding on the Association. In that context, it is stated thus:

"Ms. Charu Khurana had specifically made an application for Hair Dressers Category. It is the rule of association to disallow the female members to work as Make-up Artists. It is further to note here that Ms. Charu Khurana is also not exception to that the said rule was introduced for the betterment of the association and not to discriminate on the basis of gender. Ms. Charu Khurana has been called for the interview on 11/09/2009. She did not made herself available for the interview. Her application to the association is still pending with the association. However it's clarifies here that she is not a member of association and hence not allowed to work as a Make-up Artist in any field.

Hence your permission to Ms. Charu Khurana to work as Make-up Artist in Film/ TV serials/Music Album/Ad films is illegal and I do hereby request you to kindly withdraw the said letter at your earliest and intimate the same to Ms. Charu Khurana immediately.

Needless to state here that even if you have chosen to allow her to continue with the work, than the appropriate and strict action will be initiated against her of which please take note of."

20. The petitioners in the petition have referred to certain conferences held and how the petitioner no. 1 has been treated at other places, but to deal with the lis, it is not necessary to advert to the

same. The Association, as has been asseverated, is registered under the Trade Unions Act, 1926 (for brevity, 'the Act').

21. After notices were issued to the parties, the Registrar of Trade Unions, Maharashtra, respondent no.4 herein, through its counsel submitted that after receiving the complaint from the petitioners, it had taken up the issue with the respondent No.5 and issued directions to delete the clause that has given rise to discrimination, which is not constitutionally permissible, but the Association has not taken any steps.

22. When the matter was taken up on 4th July, 2014[4], certain aspects were noted, which are as follows:

> *It is submitted by Ms. Kalra that the two grounds which are being taken up by this kind of trade unions are that women cannot get the status of make-up persons and they can only practice as hair dressers. It is very fairly put forth by her that the petitioners have no objection if the male artists are called hair dressers as well as make-up men. In essence, the submission of learned counsel is that this differentiation which has been made by the association despite the directions made by the Registrar of Trade Unions have not only let them feel humiliated but also affected their constitutional rights to be treated with equality, apart from the various affirmative provisions contained in the Constitution of India."*

23. To put the controversy to rest, as far as the film industry in Mumbai in the State of Maharashtra is concerned, we have heard Ms. Jyotika Kalra, learned counsel for the petitioners, Mr. L.N. Rao, learned Additional Solicitor General, and Mr. Maninder Singh, learned Additional Solicitor General for Union of India, Mrs. Meenakshi Arora, learned senior counsel for National Commission for Women, Mrs. Asha G. Nair, learned counsel for the State of Maharashtra and Mr. K.H. Holambe Patil, learned counsel for the respondent No.5, the Association.

24. It is submitted by learned counsel for the petitioners that the 5th respondent has incorporated the discriminatory clause as a consequence of which their rights to carry on their avocation is absolutely hampered and there is no such justification for the classification, for the petitioners are qualified to work as make-up artist. It is urged by her unless they have the membership card, they would not be engaged as make-up artist and this has created a hazard in earning their livelihood. It is urged by her that the Association has obstinately been making a distinction between the male and female by categorising them as make-up artists and hair dressers respectively, as a result of which, the women, who are eligible and qualified to become make-up artist, never become make-up artist and only function as hair dressers. The learned counsel would also contend that the women have been harassed at the workplace whenever they get an engagement as a make-up artist. It is also canvassed by Ms. Kalra that the eligibility criteria that he/she must be a resident of Maharashtra for five years is absolutely unconstitutional and despite the direction of the Registrar of Trade Unions, the said clauses are not deleted and hence interference of this Court is called for. It is further put forth by her that similar situation has been prevalent in Tamil Nadu, Andhra Pradesh, Karnataka, Kerala and many other parts of the country.

4 Charu Khurana v. Union of India, (2015) 1 SCC 219

25. Mr. L.N. Rao, learned Additional Solicitor General submitted that this Court in the case of ***Vishaka vs. State of Rajasthan***[5], has referred to the 1993 Convention and framed certain guidelines regard being had to the sexual harassment at work places. It is contended by him that in ***Vishaka***[5] case, a three-Judge Bench has observed that with the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations and in the present case the discrimination which is founded on the basis of gender deserves to be lancinated. It is canvassed by him that the clauses relating to discrimination and the action taken by the Association are squarely hit by Articles 14, 19(1)(g) and 21 of the Constitution of India. It is submitted by the learned Additional Solicitor General that when a trade union is brought into existence, it has to function only after they get a licence from the Registrar of trade union and when the clauses in the constitution of trade union are constitutionally unacceptable, they are under legal obligation to be deleted and it is an unfortunate case that where the Association, the respondent No.5 herein has expressed its adamantine propensity not to delete the same. Mr. Rao has also contended that the spirit of Article 39A of the Constitution of India should also be taken into consideration while dealing with the controversy.

26. Ms. Meenakshi Arora, learned senior counsel appearing for the Commission has submitted that this Court while acting as a protector of the rights, should never permit such an Association to perpetuate such kind of illegality, by which the women artists are deprived of employment and that too not for any acceptable or normative reasons, but solely because of some kind of obsessive gender bias.

27. Learned counsel appearing for the respondent No.5 has submitted that the application was not rejected because she was a woman, but on the other grounds. He has drawn our attention to the communication dated 14th December, 2009, to which we shall advert to at a later stage.

28. The sixty-four thousand dollar question that emanates for consideration in this writ petition whether the female artists, who are eligible, can be deprived to work in the film industry as make-up man and only be permitted to work as hair dressers, solely because the Association, the respondent No.5 herein, which is controlled by the Trade Unions Act, 1926, has incorporated a clause relating to this kind of classification and also further stipulated that a person to work must be a resident of Maharashtra for a period of five years and nonchalantly stood embedded on its stand.

29. The unconcerned and insouciant stand is depicted from the communication dated 14.12.2009. The relevant part is as follows:

> *"We are pleased to inform you that you had applied for the membership as a Hair Dresser on 10 January, 2009. All the Certificates are from Delhi and courses certificates are from Mumbai & Delhi. You had not provided any original documents of Ration card, Telephone Bills or any other proof of been in Maharashtra for 5 years or more than that. You had provided the Xerox Copy of HP Gas Bill, but it is issued on yours mother named, as Mrs. Neelam Khurana. You have Election Card, Passport from Delhi itself.*
>
> *You have provided the bank certificate as a proof of been in Maharashtra for 9 years but Bank can be operated from any part of India. And Bank itself had specifically said that*

5 (1997) 6 SCC 241 : 1997 SCC (Cri) 932

"This certificate is issued at the party's own request without any risk & responsibility on the part of the bank or any of its signing officials."

We are sorry to inform you, as per our Constitution Rules you don't have any residential proof for being in Maharashtra for 5 years. Therefore, your application for membership has been rejected."

The aforesaid letter read in conjunction with the communication made on 01.10.2009 which we have reproduced hereinbefore, have created an impediment on the part of the petitioners to become members of the Association as make-up artists, which has deprived them the access to have employment, despite being qualified, in the films industry/TV serials/music albums/ad films. Their entry at the threshold is banned. The barriers, as is perceivable, are two-fold, first, the petitioners are women, and second, they have not produced the domicile certificates to the effect that they have resided in the State of Maharashtra for five years.

30. First, we shall take up the issue of discrimination on the ground of gender. Article 39A in Part IV of the Constitution that deals with Directive Principles of State Policy, provides that the State shall direct its policies towards securing that the citizens, men and women equally, have the right to adequate means of livelihood. Clause (d) of the said Article provides for equal pay for equal work for both men and women and Clause (e) stipulates that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter into avocations unsuited to their age or strength. In ***Minerva Mills Ltd. V. Union of India***[6], the Constitution Bench has found that the Fundamental Rights and the Directive Principles are the two quilts of the chariot in establishing the egalitarian social order. In ***Society for Unaided Private Schools of Rajasthan V. Union of India***[7], it has been held that the Court is required to interpret the Fundamental Rights in the light of the Directive Principles. The said principle was reiterated by the Constitution Bench in ***Paramati Educational and Cultural Trust (Registered) and Others V. Union of India and others***[8].

31. In this regard, it is apposite to refer to two passages from ***Ramlila Maidan Incident, In Re***[9], wherein it has been observed thus: (SCC pp. 33-34, Paras 19-22)

"19. While these are the guaranteed fundamental rights, Article 38, under the directive principles of State policy contained in Part IV of the Constitution, places a constitutional obligation upon the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice—social, economic and political—shall inform all the institutions of the national life. Article 37 makes the directive principles of State policy fundamental in the governance of the country and provides that it shall be the duty of the State to apply these principles in making laws.

20. With the development of law, even certain matters covered under this Part relating to directive principles have been uplifted to the status of fundamental rights, for instance, the right to education. Though this right forms part of the directive principles of State policy, compulsory and primary education has been treated as a part of Article

6 (1980) 3 SCC 625
7 (2012) 6 SCC 1 ; 4 SCEC 453
8 (2014) 8 SCC 1
9 (2012) 5 SCC 1 ; (2012) 2 SCC (Civ) 820 ; (2012) 2 SCC (Cri) 241 ; (2012) 1 SCC (L&S) 810 10 (2007) 2 SCC 640

21 of the Constitution of India by the courts, which consequently led to the enactment of the Right of Children to Free and Compulsory Education Act, 2009.

21. Article 51-A deals with the fundamental duties of the citizens. It, inter alia, postulates that it shall be the duty of every citizen of India to abide by the Constitution, to promote harmony and the spirit of common brotherhood, to safeguard public property and to abjure violence.

22. Thus, a common thread runs through Parts III, IV and IV-A of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts."

32. The purpose of referring to the same is to understand and appreciate how the Directive Principles of State Policy and the Fundamental Duties enshrined under Article 51A have been elevated by the interpretative process of this Court. The Directive Principles have been regarded as soul of the Constitution as India is a welfare State. At this juncture, it is apt to notice the view expressed by a two- Judge Bench of this Court in ***Ashoka Smokeless Coal India (P) Ltd. V. Union of India***[10] wherein it has been laid down that : (SCC p 683, para 106)

"106. ... the Directive Principles of State Policy provide for a guidance to interpretation of fundamental rights of a citizen as also the statutory rights."

33. In this context, a reference may be made to Article 51-A. Clauses (e) and (j) and provide as follows:

*"**51-A. (e)** to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;*

* * *

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;"

On a condign understanding of Clause (e), it is clear as a cloudless sky that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is the quintessential quality of a personality and a human frames always desires to live in the mansion of dignity, for it is a highly cherished value. Clause (j) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to see that all citizens and they are not deprived of by reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

34. In ***AIIMS Students' Union V. AIIMS and others***[11], a three-Judge Bench, while dealing with the reservation in All India Institute of Medical Sciences, observed: (SCC pp. 458 para 58)

10 (2007) 2 SCC 640
11 (2002) 1 SCC 428 ; 1 SCEC 886

"58. ... Pushing the protection of reservation beyond the primary level betrays the bigwigs' desire to keep the crippled crippled for ever. Rabindra Nath Tagore's vision of a free India cannot be complete unless "knowledge is free" and "tireless striving stretches its arms towards perfection". Almost a quarter century after the people of India have given the Constitution unto themselves, a chapter on fundamental duties came to be incorporated in the Constitution. Fundamental duties, as defined in Article 51-A, are not made enforceable by a writ of court just as the fundamental rights are, but it cannot be lost sight of that "duties" in Part IV-A Article 51-A are prefixed by the same word "fundamental" which was prefixed by the founding fathers of the Constitution to "rights" in Part III. Every citizen of India is fundamentally obligated to develop a scientific temper and humanism. He is fundamentally duty-bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. State is, all the citizens placed together and hence though Article 51-A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State."

And, thereafter opined: (SCC p. 459, para 58)

"58. ... Fundamental duties, though not enforceable by a writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51-A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by courts as a tool to tab, even a taboo, on State action drifting away from constitutional values."

35. From the aforesaid enunciation of law, it is clear as day that the duty of a citizen has been extended to the collective duty of the State. To elaborate, it becomes the duty of the State to provide for opportunities and not to curtail the opportunities.

36. At this juncture, we must appreciably note that Mr. Rao, learned Additional Solicitor General has submitted with all fairness at his command that State is making all efforts to frame such policies so that men and women are treated equally and they can have the rights and means of livelihood and no room is allowed to conceive any gender bias. Learned Additional Solicitor General would submit that the policies are framed by the State to fulfil the goals of the Constitution.

37. Having referred to the aforesaid provisions of the Constitution, and taking note of the submissions, we may presently refer to Articles 14, 19(1)(g) and 21 of the Constitution of India. Article 14 provides that the State shall not deny to any person equality before the law, or the equal protection of laws within the territory of India. Article 19(1)(g) provides that all citizens have the right to practise any profession or to carry on any occupation, trade or business. Needless to emphasise the said right is subject to reasonable restrictions to be imposed, as permissible under Article 19(6) of the Constitution. Article 21 deals with the concept of life, which has been extended to a great extent by this Court.

38. At this stage, it is seemly to note that the Association is not a State under Article 12 of the Constitution of India. It is submitted by Ms. Meenakshi Arora, learned senior counsel appearing for National Commission for Women, that the Association is not a State or may not be amenable

to writ jurisdiction under Article 226 of the Constitution of India, but its constitution and the bye-laws which have been accepted/ratified by the Registrar of Trade Unions, who have been authorised by the competent Government cannot violate the mandate of the Act or any of the constitutional commands. In essence, the submission of the learned senior counsel is, it has to be in consonance with the statutory framework and the Association, by incorporating certain stipulations, cannot create a discrimination for women which is contrary to the international treaty, that has been ratified by India and further debar all qualified and eligible women to enter into the film industry to carry their profession as make-up artists, which in the ultimate eventuate, stifle and smother their sources of livelihood. Mr. Rao, learned Additional Solicitor General, supporting the said submission, would further contend that this Court in *Vishaka*[5] has clearly observed that violation of Fundamental Rights of gender equality "Right to Life and Liberty" and "right to practise profession", attract the remedy under Article 32 for enforcement of these fundamental rights of women.

39. Before we dwell upon the relevant provisions of the Act, we may profitably delve into the concept of equality in the backdrop of gender justice. In ***Mrs. Neera Mathur V. Life Insurance Corporation of India and Anr.***[12], a female candidate was required to furnish information about her menstrual period, last date of menstruation, pregnancy and miscarriage. The Court declared that calling of such information are indeed embarrassing if not humiliating. The Court directed that the employer i.e. Life Insurance Corporation would do well to delete such columns in the declaration. In ***Maya Devi***[13], the requirement that a married woman should obtain her husband's consent before applying for public employment was held invalid and unconstitutional. The Court observed that such a requirement is an anachronistic obstacle to women's equality.

40. In ***Mackinnon Mackenzie and Co. Ltd. V. Audrey D'Costa***[14], the Court was deliberating the issue of equal pay for equal work in the context of female stenographers and male stenographers. Dealing with the aspect of discrimination, the Court opined: (SCC pp. 479-80, para 9)

> *"9. ... It may be that the management was not employing any male as a Confidential Stenographer attached to the senior executives in its establishment and that there was no transfer of Confidential Lady Stenographers to the general pool of Stenographers where males were working. It, however, ought not to make any difference for purposes of the application of the Act when once it is established that the lady Stenographers were doing practically the same kind of work which the male Stenographers were discharging. The employer is bound to pay the same remuneration to both of them irrespective of the place where they were working unless it is shown that the women are not fit to do the work of the male Stenographers. Nor can the management deliberately create such conditions of work only with the object of driving away women from a particular type of work which they can otherwise perform with the object of paying them less remuneration elsewhere in its establishment".*

41. The aforesaid pronouncement clearly spells out that there cannot be any discrimination solely on the ground of gender. It is apt to note here that reservation of seats for women in Panchayats and Municipalities have been provided under Articles 243(d) and 243(t) of the Constitution of India. The purpose of the constitutional amendment is that the women in India are required to participate more in a democratic set-up especially at the grass root level. This is an affirmative

12 (1992) 1 SCC 286
13 (1986) 1 SCR 743
14 (1987) 2 SCC 469

step in the realm of women empowerment. The 73rd and 74th amendment of the Constitution which deals with the reservation of women has the avowed purpose, that is, the women should become parties in the decision making process in a democracy that is governed by rule of law. Their active participation in the decision making process has been accentuated upon and the secondary rule which was historically given to women has been sought to be metamorphosed to the primary one. The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the sphere of profession for which she is eligible and qualified, it is well nigh impossible to conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity.

42. Having regard to the aforesaid legal exposition and factually exposé, the legal provisions of the Act are to be scanned. Section 5 of the Act provides for application for registration. It stipulates that every application for registration of a trade union shall be made to the Registrar, and shall be accompanied by a copy of the Rules of the trade unions. It is the duty of the Registrar of the Trade Unions to see that no rule is framed by any trade union which is inconsistent with the Act. Section 6 stipulates that a trade union shall not be entitled to registration under the Act, unless the executive thereof is constituted in accordance with the provisions of the Act and the rules thereof. It also provides for certain aspects some of which are, the whole of the objects for which the trade union has been established and the whole of the purposes for which the general funds of the Trade Union shall be applicable. Section 10 deals with the cancellation of registration. It provides that the certificate of registration of a Trade Union can be withdrawn or cancelled by the Registrar if the certificate has been obtained by fraud or mistake or Trade Union has ceased to exist or wilfully and after notice from the Registrar contravened any provision of the Act or allowed any rule to continue in force inconsistent with the provision or rescinded any rule providing for any manner as required by Section 6.

43. At this juncture, it is apt to refer to Sections 21 and 21A, which read as under:-

> ***21. Rights of minors to membership of trade union.*** *— Any person who has attained the age of fifteen years may be a member of a registered Trade Union subject to any rules of the Trade Union to the contrary, and may, subject as aforesaid, enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules:*
>
> ***21- A. Disqualifications of office-bearers of Trade Unions*** *— (1) A person shall be disqualified for being chosen as, and for being member of the executive or any other office-bearer of a registered Trade Union if-*
>
> *(i) he has not attained the age of eighteen years;*
>
> *(ii) he has been convicted by a Court in India of any offence involving moral turpitude and sentenced to imprisonment, unless a period of five years has elapsed since his release.*
>
> *(2) Any member of the executive or other office- bearer of a registered Trade Union who, before the commencement of the Indian Trade Unions (Amendment) Act, 1964, has been convicted of any offence involving moral turpitude and sentenced to imprisonment, shall on the date of such commencement cease to be such*

member or office- bearer unless a period of five years has elapsed since his release before that date.]

(3) In its application to the State of Jammu and Kashmir, reference in subsection (2) to the commencement of the Indian Trade Unions (Amendment) Act, 1964, shall be construed as reference to the commencement of this Act in the said State."

The aforesaid provisions make it graphically clear that Section 21-A only prescribes the age and certain other qualifications. The aforesaid statutory provisions do not make a distinction between a man and woman, and rightly so.

44. As is evincible, the respondent no.5-Association has been registered under the Trade Unions Act having registration No.1871. Its aims and objects are as follows:

a) To organize and unite the Motion Picture Costume Artist's Make-Up Artist's and Hair Dressers and their Assistants with a view to protect their interests.

b) To secure to the members fair conditions of life and services and to protect them from unfair labour practice in the Trade, keeping the relations with other Trade Unions in the Film Industry.

c) To try to standardize minimum wages and contractual remuneration, as devised from time to time.

d) To try by all legal means to redress their grievances.

e) To endeavour to regulate the relations of the members among themselves as and for their employers, and to secure them fair conditions of life service and career.

f) To endeavour to secure compensation for members in case of accidents under the Workmen's Compensation Act.

g) To provide the members against unemployment, sickness, infantry, old age if funds permit.

h) To provide legal assistants to members in respect of matters arising out of or incidental to their employment if in the opinion of the Executive Committee it is found necessary and expedient.

i) To endeavour to render aid to the members during any strike or lockout brought accident with the sanction of the Association.

j) To co-operate and federate with other Organisations in India and abroad having similar object.

k) To help in accordance with Indian Trade Unions Act, working classes in India and outside in the promotion of the objects mentioned in this clause.

45. The Association has its own bye-laws. Clause 4 of the bye-laws reads as follows:

*"4. **Membership:** Membership of the Association shall comprise of Make-up men, Costume men, and Hair Dressers who were admitted as members by the Association & who continue to be members 14.4.85 and all those who shall be admitted hereafter under clauses 6 & 7 of the constitution of the Association including the membership in Family Relief fund, provided he/she agrees & abide by the rules & sub- rules that may form by the Association from time to time.*"

Clause 6 deals with admission of new members. *It reads as follows:*

> *"6. **Admission of new members**:— Any person desiring to become the member of the Association who has attained the age of majority of 18 and who possess a good moral character shall send an application in prescribed form and duly recommended by two members with its prescribed fees.*
>
> *A. Applicant should have been a resident of Maharashtra at least for 5 years.*
>
> *B. Son or Daughter of members who have completed 15 years of membership shall be eligible to be enrolled as members of the Association, provided they fulfil other conditions relating to age and domicile status of 5 years in the State of Maharashtra.*

46. These bye-laws have been certified by the Registrar of Trade Unions in exercise of the statutory power. Clause 4, as is demonstrable, violates Section 21 of the Act, for the Act has not made any distinction between men and women. Had it made a bald distinction it would have been indubitably unconstitutional. The legislature, by way of amendment in Section 21A, has only fixed the age. It is clear to us that the clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, Article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood.

47. In this regard, we may refer to certain authorities. In ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi***[15], it has been held thus: (SCC p. 618, para 6)

> *"6. ... The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person".*

48. In ***Olga Tellis v. Bombay Municipal Corpn.***[16], the Constitution Bench speaking through Chandrachud, C.J., observed thus: (SCC p. 572, para 32)

> *"An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life".*

15 (1981) 1 SCC 608
16 (1985) 3 SCC 545

49. Recently, in ***Centre for Environment & Food Security v. Union of India***[17], a three-Judge Bench had opined as follows: (SCC p. 677, para 1)

> *"1. ... The Framers of the Constitution, in the Preamble to the Constitution, guaranteed to secure to its citizens justice social, economic and political as well as equality of status and opportunity but the "right to employment" was not incorporated in Part III of the Constitution as a fundamental right. By judicial pronouncements, the Courts expanded the scope of Article 21 of the Constitution of India and included various facets of life as rights protected under the said article despite the fact that they had not been incorporated by specific language in Part III by the Framers of the Constitution".*

The said views were expressed in the context of the scheme of National Rural Employment Guarantee Act, 2005.

50. From the aforesaid enunciation of law, the signification of right to livelihood gets clearly spelt out. A clause in the bye-laws of a trade union, which calls itself an Association, which is accepted by the statutory authority, cannot play foul of Article 21.

51. Presently, we shall advert to the law laid down in *Vishaka case*[5]. The Court referred to the 1993 Treaty and opined that the meaning and content of Fundamental Rights in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. In that context, the Court observed thus: (SCC p. 251, para 14)

> *"14. ... The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms fro construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in* ***Minister for Immigration and Ethnic Affairs vs. Teoh.***[18] *has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia".*

The three-Judge Bench[5], while noting the increasing awareness on gender justice, took note of the increase in the effort to guard against such violations. The Court observed that when there is violation of gender justice and working woman is sexually harassed, there is violation of the fundamental rights of gender justice and it is clear violation of the rights under Articles 14, 15 and 21 of the Constitution.

52. Thus, the aforesaid decision in *Vishaka case*[5] unequivocally recognises gender equality as a fundamental right. The discrimination done by the Association, a trade union registered under the Act, whose rules have been accepted, cannot take the route of the discrimination solely on the basis of sex. It really plays foul of the statutory provisions.

It is absolutely violative of constitutional values and norms. If a female artist does not get an opportunity to enter into the arena of being a member of the Association, she cannot work as a female artist. It is inconceivable. The likes of the petitioners are given membership as hair

17 (2011) 5 SCC 676

18 (1995) *128 ALR 535 ; (1995) 183 CLR 273 (Aust)*

dressers, but not as make-up artist. There is no fathomable reason for the same. It is gender bias writ large. It is totally impermissible and wholly unacceptable.

53. Having dealt with the concept of discrimination, now we shall dwell upon the second facet, that is, denial of the issue of card to work as make-up artists on the ground that one is not a resident in the State of Mahrashtra. In ***Pradeep Jain v. Union of India***[19], it has been held thus: (SCC pp. 672-73, para 10)

> *"10. ... What is fundamental, as an enduring value of our polity, is guarantee to each of equal opportunity to unfold the full potential of his personality. Anyone anywhere, humble or high, agrestic or urban, man or woman, whatever be his language or religion, place of birth or residence, is entitled to be afforded equal chance for admission to any secular educational course for cultural growth, training facility, speciality or employment. It would run counter to the basic principle of equality before the law and equal protection of the law if a citizen by reason of his residence in State A, which ordinarily in the commonality of cases, would be the result of his birth in a place situate within that State, should have opportunity for education or advancement which is denied to another citizen because he happens to be resident in State B. It is axiomatic that talent is not the monopoly of the residents of any particular State; it is more or less evenly distributed and given proper opportunity and environment, everyone has a prospect of rising to the peak. What is necessary is equality of opportunity and that cannot be made dependent upon where a citizen resides. If every citizen is afforded equal opportunity, genetically and environmentally, to develop his potential, he will be able in his own way to manifest his faculties fully leading to all round improvement in excellence. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of our founding faith and constitutional creed".*

54. Recently, in ***Nikhil Himthani v. State of Uttarakhand***[20], the Court, while dealing with eligibility criteria for appointment to the post-graduate medical/dental course, fixed by the Department of Medical Education, Government of Uttrakhand, Dehradun, adverted to clause 2 and 3 which basically related to domicile of Uttrakhand. In the said context, the Court, placing reliance on ***Saurabh Chaudri V. Union of India***[21] and in that backdrop, decided the constitutional validity of clauses 1, 2 and 3 of the eligibility criteria in the information bulletin. Clause 5 of the bulletin prescribed that eligible candidates who get selected through NEET-PG 2013/NEET (MDS)-2013 will be given admission on available seats in postgraduate courses according to their rank in State merit list, made available by NBE/MCI/DCI/AIIMS and the seats available at that time. Clause 6 stipulated that having name in the State merit list o eligible candidates provided by MCI/DCI/NBE/AIIMS will not confer the right on the candidate for getting PG seats unless he/she fulfils all the eligibility criteria regarding domicile, reservation policy, provisions of bond, etc mentioned in the information bulletin and/or amendments made thereafter till the time of counselling. Clause 1 of the eligibility criteria stipulated that a candidate must have passed an MBBS examination from Uttrakhand in any of the colleges named therein and must have been admitted through the competitive examination, namely, Uttrakhand State PMT. The petitioner in the said case was not admitted through the Uttrakhand State PMT to the medical college

19 (1984) 3 SCC 654
20 (2013) 10 SCC 237
21 (2003) 11 SCC 146

and, therefore, did not fulfil the eligibility criteria for admission to the medical post graduate course under clause 1 of the eligibility criteria. Clause 2 of the eligibility criteria stipulated that the candidates who were domicile of Uttrakhand and passed MBBS examination from medical colleges from other States and were admitted through 15% All India quota, were also eligible for admission to the post graduate medical courses. But as the petitioner was not a domicile of Uttrakhand and passed MBBS examination from a medical college of other States, was not eligible for admission to the post-graduate course. Under Clause 3 of the eligibility criteria, who were domicile of Uttrakhand and had passed MBBS from medical colleges of other States in India, were admitted through pre-medical test conducted by the State Government as they were eligible for admission. While dealing with these clauses, the Court noted the submission of learned counsel for the State of Uttrakhand that as per the Constitution Bench decision in ***Saurabh Chaudri*** (supra) institutional preference is a matter of State Policy which alone can be invalidated in the event of being violative of Article 14 of the Constitution of India and as the State of Uttrakhand was entitled to make its own Policy with regard to institutional preference, the clauses could not be invalidated.

55. The Court posed the question whether the clauses 1, 2 and 3 of the eligibility criteria in the information bulletin are ultra vires of Article 14 of the Constitution of India. In that context, the Court held: (*Nikhil Himthani case*[20], SCC pp. 246-47, paras 15-16 and 19)

> *"15. ... We are thus of the considered opinion that to exclude the petitioner from consideration on the basis of his merit only on the ground that he was not admitted to the MBBS course through the Uttarakhand PMT would be to deny him equality of opportunity in matter of admission to the postgraduate medical course and to violate his right to equality under Article 14 of the Constitution as explained by this Court in Pradeep Jain v. Union of India[19].*
>
> *16. We now come to Clauses 2 and 3 of the eligibility criteria in the Information Bulletin. Under Clauses 2 and 3, a domicile of Uttarakhand who has passed MBBS from a medical college of some other State having been admitted either through the 15% all-India quota or through the pre-medical test conducted by the State Government concerned has been made eligible for admission to a postgraduate medical course in the State quota. Obviously, a candidate who is not a domicile of Uttarakhand State is not eligible for admission to the postgraduate course under Clauses 2 and 3 of the eligibility criteria. Preference, therefore is given only on the basis of residence or domicile in the State of Uttarakhand under Clauses 2 and 3 of the eligibility criteria and such preference on the basis of residence or domicile within a State has been held to be violative of Article 14 of the Constitution in* ***Pradeep Jain v. Union of India***[19] *and* ***Magan Mehrotra v. Union of India***[22].
>
> *xxx xxx xxx xxx*
>
> *19. Thus, it will be clear from what has been held by the three-Judge Bench of this Court in* ***Magan Mehrotra v. Union of India***[22] *that no preference can be given to the candidates on the basis of domicile to compete for the institutional quota of the State if such candidates have done their MBBS course in colleges outside the State in view of the decisions of this Court in Pradeep Jain v. Union of India[19]. Hence, Clauses 2 and 3 of the eligibility criteria in the Information Bulletin are also violative of Article 14 of the Constitution".*

22 (2003) 11 SCC 186

56. In the case at hand, it does not relate to reservation but relates to having access to employment. Here, as we find the concept of domicile, as stipulated, has no rationale. It invites the frown of Articles 14, 15 and 21 of the Constitution of India. At this juncture, we must note with profit, as submitted by Mr. Rao, learned Additional Solicitor General that in the matter of public employment there has to be special provision. He has drawn our attention to Article 371D(1) of the Constitution. It reads as follows:

> ***"371D. Special provisions with respect to the State of Andhra Pradesh.—*** *(1) The President may, by order made with respect to the State of Andhra Pradesh, provide, having regard to the requirements of the State as a whole, for equitable opportunities and facilities for the people belonging to different parts of the State, in the matter of public employment and in the matter of education, and different provisions may be made for various parts of the State*".

It is submitted by him that the State is extremely careful to see that equitable opportunities and facilities are provided to all the citizens of the country. Unless the special provision is made, a trade union, which is registered under the statutory provision, cannot make a rule/regulation/ bye-law contrary to the constitutional mandate and the statutory authority cannot accept the same. Be it stated, realising this, the Registrar of Trade Unions had directed the 5th respondent to delete the said rules. Despite the said direction, the 5th respondent has not done so.

57. It is really shocking that the respondent no.5 has maintained such an adamantine attitude. In ordinary circumstances, the Registrar would have been directed to cancel the registration but we do not intend to do so. As the clauses relating to the membership and the domicile, namely, clause 4 and 6, are violative of the statutory provisions and the constitutional mandate and taking further note of the fact that the Registrar would have been, in normal circumstances, directed by us requiring the trade union to delete the clauses, we quash the said clauses and further direct that the petitioners shall be registered as members of the 5th respondent within four weeks. It will be the obligation of the Registrar of Trade Unions to see that they are registered as make-up artists. If the Association would create any hurdle, it will be obligatory on the part of the police administration to see that the female make-up artists are not harassed in any manner whatsoever, for harassment of a woman is absolutely unconscionable, unacceptable and intolerable. Our directions close the matter as far as the State of Maharashtra is concerned.

58. Let the matter be listed in the first week of January, 2015, in respect of other States.

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LANDMARK JUDGMENTS ON

DIVORCE

MANISH GOEL VERSUS ROHINI GOEL

(Special Leave Petition (C) No. 2954 of 2010) FEBRUARY 5, 2010

Manish Goel
v.
Rohini Goel

(Before Hon'ble Mr. Justice Aftab Alam and Hon'ble Mr. Justice B.S. Chauhan, JJ.)

2010 (2) SCR 414

The statutory period of six months for filing the second petition under Section 13-B(2) of the Act has been prescribed for providing an opportunity to parties to reconcile and withdraw petition for dissolution of marriage. Learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1)of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction.

Thus, this is not a case where there has been any obstruction to the stream of justice or there has been injustice to the parties, which is required to be eradicated, and this Court may grant equitable relief. Petition does not raise any question of general public importance. None of contingencies, which may require this Court to exercise its extraordinary jurisdiction under Article 142 of the Constitution, has been brought to our notice in the case at hand.

The Order of the Court was delivered by

ORDER

DR. B.S. CHAUHAN, J.

1. This case reveals a very sorry state of affairs that the parties, merely being highly qualified, have claimed even to be higher and above the law, and have a vested right to use, misuse and abuse the process of the Court. Petitioner, the husband, possesses the qualifications of CA, CS and ICWA, while the proforma respondent-wife is a Doctor (M.D., Radio-Diagnosis) by profession. The parties got married on 23rd July, 2008 in Delhi. Their marriage ran into rough weather and relations between them became strained immediately after the marriage and they are living separately since 24.10.2008. Petitioner-husband filed a Matrimonial Case under Section 12 of the Hindu Marriage Act, 1955 (hereinafter called as "the Act") for annulment of marriage before a competent Court at Gurgaon. The respondent-wife, Smt. Rohini Goel filed a petition under Section 12 r/w Section 23 of the Domestic Violence Act, 2005 before the competent Court at Delhi. An FIR was also lodged by her against petitioner-husband and his family members under Sections 498-A, 406 and 34 of Indian Penal Code, 1860 at PS Janakpuri, New Delhi.

2. It is stated at the Bar that by persuasion of the family members and friends, the parties entered into a compromise and prepared a Memorandum of Understanding dated 13.11.2009 in the proceedings pending before the Mediation Centre, Delhi by which they agreed on terms and conditions incorporated therein, to settle all their disputes and also for dissolution of their

marriage. The parties filed an application under Section 13-B(1) of the Act before the Family Court, i.e. ADJ-04 (West) Delhi seeking divorce by mutual consent. The said HMA No.456 of 2009 came before the Court and it recorded the statement of parties on 16.11.2009. The parties moved another HMA No. 457 of 2009 to waive the statutory period of six months in filing the second petition. However, the Court rejected the said application vide order dated 1.12.2009 observing that the Court was not competent to waive the required statutory period of six months under the Act and such a waiver was permissible only under the directions of this Court as held by this Court in Anil Kumar Jain v. Maya Jain (2009) 10 SCC 415. Hence, this petition.

3. The learned counsel for the petitioner submits that there is no prohibition in law in entertaining the petition under Article 136 of the Constitution against the order of the Family Court and in such an eventuality, there was no occasion for the petitioner to approach the High Court as therelief sought herein cannot be granted by any court other than this Court. Thus, the petitioner has a right to approach this Court against the order of the Family Court and the petitioner cannot be non-suited on this ground alone.

4. Article 136 of the Constitution enables this Court, in its discretion to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

Undoubtedly, under Article 136 in the widest possible terms, a plenary jurisdiction exercisable on assuming appellate jurisdiction has been conferred upon this Court. However, it is an extra-ordinary jurisdiction vested by the Constitution in the Court with implicit trust and faith and thus, extra ordinary care and caution has to be observed while exercising this jurisdiction. There is no vested right of a party to approach this Court for the exercise of such a vast discretion, however, such a course can be resorted to when this court feels that it is so warranted to eradicate injustice. Such a jurisdiction is to be exercised by the consideration of justice and call of duty. The power has to be exercised with great care and due consideration but while exercising the power, the order should be passed taking into consideration all binding precedents otherwise such an order would create problems in the future. The object of keeping such a wide power with this Court has been to see that injustice is not perpetuated or perpetrated by decisions of courts below. More so, there should be a question of law of general public importance or a decision which shocks the conscience of the court are some of the prime requisites for grant of special leave. Thus, unless it is shown that exceptional and special circumstances exist that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity warranting review of the decision appealed against, such exercise should not be done. The power under Article 136 cannot be used to short circuit the legal procedure prescribed in overriding power. This Court generally does not permit a party to by-pass the normal procedure of appeal or reference to the High Court unless a question of principle of great importance arises. It has to be exercised exceptionally and with caution and only in such an extraordinary situations. More so, such power is to be exercised taking into consideration the well established principles which govern the exercise of overriding constitutional powers (vide Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal AIR 1955 SC 65; The Union of India v. Kishorilal Gupta & Bros. AIR 1959 SC 1362; Murtaza & Sons & Anr. v. Nazir Mohd. Khan & Ors. AIR 1970 SC 668; Sirpur Paper Mills Ltd. v. Commissioner of Wealth Tax, Hyderabad AIR 1970 SC 1520; The Municipal Corporation, Bhopal v. Misbahul Hasan & Ors. AIR 1972 SC 892; Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of

Gujarat and Ors. AIR 1991 SC 2176; Tirupati Balaji Developers Pvt. Ltd. & Ors. v. State of Bihar & Ors. AIR 2004 SC 2351; and F.G.P. Ltd. v. Saleh Hooseini Doctor (2009) 10 SCC 223).

5. In Union of India & Ors. v. Karnail Singh (1995) 2 SCC 728, this court while dealing with the similar issue held as under:

> *"It is true that this Court when exercises its discretionary power under Article 136 or passes any order under Article 142, it does so with great care and due circumspection. But, when we are settling the law in exercise of this court's discretion, such law, so settled, should be clear and become operational instead of being kept vague, so that it could become a binding precedent in all similar cases to arise in future."*

6. It has been canvassed before us that under Article 142 of the Constitution, this Court is competent to pass any order to do complete justice between the parties and grant decree of divorce even if the case may not meet the requirement of statutory provisions. The instant case presents special features warranting exercise of such power. We are fully alive of the fact that this court has been exercising the power under Article 142 of the Constitution for dissolution of marriage where the Court finds that marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted. Decree of divorce has been granted to put quietus to all litigations between the parties and to save them from further agony, as it is evident from the judgments in Romesh Chander v. Savitri AIR 1995 SC 851; Kanchan Devi v. Promod Kumar Mittal AIR 1996 SC 3192; Anita Sabharwal v. Anil Sabharwal (1997) 11 SCC 490; Ashok Hurra v. Rupa Bipin Zaveri AIR 1997 SC 1266; Kiran v. Sharad Dutt (2000) 10 SCC 243; Swati Verma v. Rajan Verma AIR 2004 SC 161; Harpit Singh Anand v. State of West Bengal (2004) 10 SCC 505; Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit (2005) 13 SCC 410; Durga P. Tripathy v. Arundhati Tripathy AIR 2005 SC 3297;; Naveen Kohli v. Neelu Kohli AIR 2006 SC 1675; Sanghamitra Ghosh v. Kajal Kumar Ghosh (2007) 2 SCC 220; Rishikesh Sharma v. Saroj Sharma (2007) 2 SCC 263; Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511; and Satish Sitole v. Ganga AIR 2008 SC 3093.

   However, these are the cases, where this Court came to rescue the parties on the ground for divorce not provided for by the legislature in the statute.

7. In Anjana Kishore v. Puneet Kishore (2002) 10 SCC 194, this Court while allowing a transfer petition directed the court concerned to decide the case of divorce by mutual consent, ignoring the statutory requirement of moving the motion after expiry of the period of six months under Section 13-B(2) of the Act.

8. In Anil Kumar Jain (supra), this Court held that an order of waiving the statutory requirements can be passed only by this Court in exercise of its powers under Article 142 of the Constitution. The said power is not vested with any other court.

9. However, we have also noticed various judgments of this Court taking a contrary view to the effect that in case the legal ground for grant of divorce is missing, exercising such power tantamounts to legislation and thus transgression of the powers of the legislature, which is not permissible in law (vide Chetan Dass v. Kamla Devi AIR 2001 SC 1709; and Vishnu Dutt Sharma v. Manju Sharma (2009) 6 SCC 379).

10. Generally, no Court has competence to issue a direction contrary to law nor the Court can direct an authority to act in contravention of the statutory provisions. The courts are meant

to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab & Ors. v. Renuka Singla & Ors (1994) 1 SCC 175; State of U.P. & Ors. v. Harish Chandra & Ors. AIR 1996 SC 2173; Union of India & Anr. v. Kirloskar Pneumatic Co. Ltd. AIR 1996 SC 3285; Vice Chancellor, University of Allahabad & Ors. v. Dr. Anand Prakash Mishra & Ors. (1997) 10 SCC 264; and Karnataka State Road Transport Corporation v. Ashrafulla Khan & Ors. AIR 2002 SC 629).

11. A Constitution Bench of this Court in Prem Chand Garg & Anr. v. Excise Commissioner, U.P. & Ors. AIR 1963 SC 996 held as under:

> *"An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws."*

The Constitution Benches of this Court in Supreme Court Bar Association v. Union of India & Anr. AIR 1998 SC 1895; and E.S.P. Rajaram & Ors. v. Union of India & Ors. AIR 2001 SC 581 held that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure.

12. Similar view has been reiterated in A.R. Antulay v. R.S. Nayak & Anr. (1988) 2 SCC 602; Bonkya alias Bharat Shivaji Mane & Ors. v. State of Maharashtra (1995) 6 SCC 447; Common Cause, a Registered Society v. Union of India & Ors. AIR 1999 SC 2979; M.S. Ahlawat v. State of Haryana AIR 2000 SC 168; M.C. Mehta v. Kamal Nath & Ors. AIR 2000 SC 1997; State of Punjab & Anr. v. Rajesh Syal (2002) 8 SCC 158; Government of West Bengal v. Tarun K. Roy & Ors. (2004) 1 SCC 347; Textile Labour Association v. Official Liquidator AIR 2004 SC 2336; State of Karnataka & Ors. v. Ameerbi & Ors. (2007) 11 SCC 681; Union of India & Anr. v. Shardindu AIR 2007 SC 2204; and Bharat Sewa Sansthan v. U.P. Electronic Corporation Ltd. AIR 2007 SC 2961.

13. In Teri Oat Estates (P) Ltd. v. UT. Chandigarh (2004) 2 SCC 130, this Court held as under:

> *"36….. sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. … despite an extraordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order which would be in contravention of a statutory provision."*

14. In Laxmidas Morarji (dead) by L.Rs. v. Behrose Darab Madan (2009) 10 SCC 425, while dealing with the provisions of Article 142 of the Constitution, this Court has held as under:

> *" ….The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally*

inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties." (Emphasis added)

15. Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor the power is exercised merely on sympathy.

16. The instant case requires to be examined in the light of aforesaid settled legal propositions. Parties got married on 23.7.2008 and as they could not bear each other, started living separately from 24.10.2008. There had been claims and counter claims, allegations and criminal prosecution between them. Petitioner approached the Competent Court at Gurgaon for dissolution of marriage. Admittedly, that case is still pending consideration. Parties filed the petition for divorce by mutual consent only in November 2009 before the Family Court, Delhi. Learned counsel for the petitioner could not explain as to how the case for divorce could be filed before the Family Court, Delhi during the pendency of the case for divorce before the Gurgaon Court. Such a procedure adopted by the petitioner amounts to abuse of process of the court. Petitioner has approached the different forums for the same relief merely because he is very much eager and keen to get the marriage dissolved immediately even by abusing the process of the Court. In Jai Singh v. Union of India AIR 1977 SC 898, this Court while dealing with a similar issue held that a litigant cannot pursue two parallel remedies in respect of the same matter at the same time. This judgment has subsequently been approved by this Court in principle but distinguished on facts in Awadh Bihari Yadav v. State of Bihar AIR 1996 SC 122; and Arunima Baruah v. Union of India (2007) 6 SCC 120.

17. In Dr. Buddhi Kota Subbarao v. K. Parasaran & Ors. AIR 1996 SC 2687, this Court has observed as under:-

"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions."

18. Even otherwise, the statutory period of six months for filing the second petition under Section 13-B(2) of the Act has been prescribed for providing an opportunity to parties to reconcile and withdraw petition for dissolution of marriage. Learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction.

Thus, this is not a case where there has been any obstruction to the stream of justice or there has been injustice to the parties, which is required to be eradicated, and this Court may grant equitable relief. Petition does not raise any question of general public importance. None of contingencies, which may require this Court to exercise its extraordinary jurisdiction under Article 142 of the Constitution, has been brought to our notice in the case at hand.

19. Thus, in view of the above, we do not find any justification to entertain this petition. It is accordingly dismissed.

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DR. (MRS.) MALATHI RAVI, M.D. VERSUS DR. B.V. RAVI, M.D.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5862 OF 2014

(Arising out of S.L.P. (C) No. 17 of 2010)
(Before Hon'ble Mr. Justice Sudhansu Jyoti Mukhopadhaya & Hon'ble Mr. Justice Dipak Misra, JJ.)

Dr. (Mrs.) Malathi Ravi, M.D. ... Appellant
Versus
Dr. B.V. Ravi, M.D. ...Respondent

Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond.

The case at hand initiated by the husband for dissolution of marriage was viewed from a different perspective by the learned Family Court Judge who declined to grant divorce as the factum of desertion as requisite in law was not proved but the High Court, considering certain facts and taking note of subsequent events for which the appellant was found responsible, granted divorce. The High Court perceived the acts of the appellant as a reflection of attitude of revenge in marriage or for vengeance after the reunion pursuant to the decree for restitution of marriage.

Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1)(ib). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where [pic]the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

JUDGMENT

Dipak Misra, J.

Leave granted.

2. Marriage as a social institution is an affirmance of civilized social order where two individuals, capable of entering into wedlock, have pledged themselves to the institutional norms and values and promised to each other a cemented bond to sustain and maintain the marital obligation. It stands as an embodiment for continuance of the human race. Despite the pledge and promises, on certain occasions, individual incompatibilities, attitudinal differences based upon egocentric perception of situations, maladjustment phenomenon or propensity for non-adjustment or refusal for adjustment gets eminently projected that compels both the spouses to take intolerable positions abandoning individual responsibility, proclivity of asserting superiority complex, betrayal of trust which is the cornerstone of life, and sometimes a pervert sense of revenge, a dreadful diet, or sheer sense of envy bring the cracks in the relationship when either both the spouses or one of the spouses crave for dissolution of marriage – freedom from the institutional and individual bond. The case at hand initiated by the husband for dissolution of marriage was viewed from a different perspective by the learned Family Court Judge who declined to grant divorce as the factum of desertion as requisite in law was not proved but the High Court, considering certain facts and taking note of subsequent events for which the appellant was found responsible, granted divorce. The High Court perceived the acts of the appellant as a reflection of attitude of revenge in marriage or for vengeance after the reunion pursuant to the decree for restitution of marriage. The justifiability of the said analysis within the parameters of Section 13(1) of the Hindu Marriage Act, 1955 (for brevity "the Act") is the subject-matter of assail in this appeal, by special leave, wherein the judgment and decree dated 11.09.2009 passed by the High Court of Karnataka in MFA No. 9164 of 2004 reversing the decree for restitution of conjugal rights granted in favour of the wife and passing a decree for dissolution of marriage by way of divorce allowing the petition preferred by the respondent-husband, is called in question.

3. The respondent-husband, an Associate Professor in Ambedkar Medical College, Kadugondanahalli, Bangalore, filed a petition, M.S. No. 5 of 2001 under Section 13(1) the Act seeking for a decree for judicial separation and dissolution of marriage. However, in course of the proceeding the petition was amended abandoning the prayer for judicial separation and converting the petition to one under Section 13(1)(ib) of the Act seeking dissolution of marriage by way of divorce.

4. In the petition filed before the Family court, it was averred by the respondent-husband that the marriage between the parties was solemnized in accordance with Hindu Rites and customs on 23.11.1994. After the marriage the husband and wife stayed together for one and a half years in the house of the father of the husband but from the very first day the appellant-wife was noncooperative, arrogant and her behaviour towards the family members of the husband was unacceptable. Despite the misunderstanding, a male child was born in the wedlock and thereafter, the wife took the child and left the house and chose not to come back to the husband or his family for a period of three years. It was pleaded that there had been a marital discord and total noncompatibility, and she had deserted him severing all ties. It was also alleged that she had left the tender child in the custody of her parents and joined a post graduate course in the Medical College of Gulbarga. All the efforts by the husband to bring her back became an exercise in futility inasmuch as the letters written by him were never replied. Despite the non-responsive attitude of the wife, he, without abandoning the hope for reconciliation for leading a normal married life, went to the house of his in-laws, but her parents ill treated him by forcibly throwing him out of the house.

5. It was the assertion of the husband that after she completed her course, she started staying with her parents along with the child at Bangalore and neither he nor his family members were invited for the naming giving ceremony of the child. As set forth, the conduct of the wife caused immense mental hurt and trauma, and he suffered unbearable mental agony when the family members of his wife abused and ill treated him while he had gone to pacify her and bring her back to the matrimonial home. All his solicitations and beseechments through letters to have normalcy went in vain which compelled him to issue a notice through his counsel but she chose not to respond to the same. Under these circumstances, the petition was filed for judicial separation and thereafter, as has been stated earlier, prayer was amended seeking dissolution of marriage on the ground of desertion since she had deliberately withdrawn from his society.

6. The wife filed objections contending, inter alia, that when she was residing in the matrimonial home, the sister and brother-in-law of the husband, who stayed in the opposite house, were frequent visitors and their interference affected the normal stream of life of the couple. They influenced the husband that he should not allow his wife to prosecute her studies and be kept at home as an unpaid servant of the house. The husband, as pleaded, was torn in conflict as he could not treat the wife in the manner by his sister and brother-in-law had desired and also could not openly express disagreement. At that juncture, as she was in the family way, as per the customs, she came to her parental home and by the time the child was born the sister and brother-in-law had been successful in poisoning the mind of the husband as a result of which neither he nor his relatives, though properly invited, did not turn up for the naming ceremony. All her attempts to come back to the matrimonial home did not produce any result since the husband was acting under the ill-advice of his sister and brother-in-law. It was put forth that he had without any reasonable cause or excuse refused to perform his marital obligations. The plea of mental hurt and trauma was controverted on the assertion that she had never treated him with cruelty nor was he summarily thrown out of the house of her parents.

7. Be it stated, the wife in the same petition filed an application under Section 9 of the Act for restitution of conjugal rights to which an objection was filed by the husband stating, inter alia, that no case had been made out for restitution of conjugal rights but, on the contrary, vexatious

allegations had been made. It was further averred that the wife had deserted him for more than five years and she had been harassing him constantly and consistently.

8. In support of their respective pleas the husband and wife filed evidence by way of affidavit and were crossexamined at length by the other side. On behalf of the husband 12 documents were exhibited as Exts. P-1 to P-12 and the wife examined one witness and exhibited four documents, Exts. R-1 to R-4.

9. The family court formulated the following points for consideration: -

"(1) Whether the petitioner proves that respondent assaulted him for a continuous period of not less than 2 years immediately proceeding the presentation of the petition?

(2) Whether the respondent proves that the petitioner without reasonable excuse withdrawn from the society?

(3) Whether the petitioner is entitled for decree of divorce as prayed for?

(4) Whether the respondent is entitled for decree of restitution of conjugal right as prayed for?

(5) What order?"

10. The learned Principal Judge of the family court, appreciating the oral and documentary evidence on record came to hold that the material on record gave an impression that there was no scuffle between the husband and the wife; that even after the birth of the child the husband and his family members used to visit the wife at her parental home to see the child; that there was no material on record to show that when he went to his inlaws house to see the child, he was ill-treated in any manner; that after the child was born he had taken the child along with her for vaccination and spent sometime; that though the husband and his relatives were invited for naming ceremony of the child, they chose not to attend; that the husband was able to recognize his son from the photograph in Ext. R-2; that the plea of the husband that he was not allowed to see the child did not deserve acceptation; that the circumstances did not establish that wife had any intention to bring the conjugal relationship to an end but, on the contrary, she was residing in her parents' house for delivery and then had to remain at Gulbarga for prosecuting her higher studies; that while she was studying at Gulbarga, as is evident from Ext. R-4, the husband stayed there for two days, i.e., 27.5.1999 and 28.5.1999; that from the letters vide Exts. P-3, P-7, P-9 and P-11 nothing was discernible to the effect that the wife went to Gulbarga for her studies without his permission and she had deserted him; that the husband had not disclosed from what date he stopped visiting the house of the wife's parents after the birth of the child; that the letters written by the husband did not reflect the non-cooperative conduct of the wife; that there was no sufficient evidence to come to a definite conclusion that the wife had deserted the husband with an intention to bring the matrimonial relationship to an end; that assuming there was desertion yet the same was not for a continuous period of two years immediately preceding the presentation of the petition; that the husband only wrote letters after 15.9.1999 and nothing had been brought on record to show what steps he had taken for resumption of marital ties with the wife if she had deserted him; that the wife was not allowed to come back to the matrimonial home because of intervention of his sister and brother-inlaw; that the explanation given by the wife to her nonresponse to the letters was that when she was thinking to reply the petition had already been filed was acceptable; that as the husband was working at Ambedkar Medical College in the Department of Biochemistry and wife had joined in the Department of Pathology

which would show that she was willing to join the husband to lead a normal marital life; and that it was the husband who had withdrawn from the society of the wife without any reasonable cause. Being of this view, the learned Family Judge dismissed the application for divorce and allowed the application of the wife filed under Section 23(a) read with Section 9 of the Act for restitution of conjugal rights.

11. After the said judgment and decree was passed by the learned Family Judge, the respondent did not prefer an appeal immediately. He waited for the wife to join and for the said purpose he wrote letters to her and as there was no response, he sent a notice through his counsel. The wife, eventually, joined on 22.8.2004 at the matrimonial house being accompanied by her relative who was working in the Police Department. As the turn of events would uncurtain, the wife lodged an FIR No. 401/2004 dated 17.10.2004 at Basaveshwaranagar alleging demand of dowry against the husband, mother and sister as a consequence of which the husband was arrested being an accused for the offences under Section 498A and 506 read with Section 34 of the Indian Penal Code and also under the provisions of Dowry Prohibition Act. He remained in custody for a day until he was enlarged on bail. His parents were compelled to hide themselves and moved an application under Section 438 of the Code of Criminal Procedure and, ultimately, availed the benefit of said provision. After all these events took place, the husband preferred an appeal along with application for condonation of delay before the High Court which formed the subject-matter of M.F.A. No. 9164/04 (FC). The High Court condoned the delay, took note of the grounds urged in the memorandum of appeal, appreciated the subsequent events that reflected the conduct of the wife and opined that the attitude of the wife confirmed that she never had the intention of leading a normal married life with the husband and, in fact, she wanted to stay separately with the husband and dictate terms which had hurt his feelings. The High Court further came to the conclusion that the husband had made efforts to go to Gulbarga on many an occasion, tried to convince the wife to come back to the matrimonial home, but all his diligent efforts met with miserable failure. As the impugned judgment would reflect, the behaviour of the wife established that she deliberately stayed away from the marital home and intentionally caused mental agony by putting the husband and his family to go through a criminal litigation. That apart, the High Court took the long separation into account and, accordingly, set aside the judgment and decree for restitution of conjugal rights and passed a decree for dissolution of marriage between the parties.

12. We have heard Mr. Shanth Kumar V. Mohale, learned counsel for the appellant and Mr. Balaji Srinivasan, learned counsel for the respondent.

13. Assailing the legal sustainability of the judgment of the High Court, Mr. Shanth Kumar, learned counsel appearing for the appellant, submitted that when the petition for divorce was founded solely on the ground of desertion and a finding was returned by the family court that the ingredients stipulated under Section 13(1)(ib) of the Act were not satisfied making out a case of desertion on the part of the wife, the High Court should have concurred with the same and not proceeded to make out a case for the respondent-husband on the foundation of mental cruelty. It is urged by him that the High Court has taken note of subsequent events into consideration without affording an opportunity to the appellant to controvert the said material and that alone makes the decision vulnerable in law. Learned counsel would submit that the High Court has erroneously determined the period of communication of letters and the silence maintained by the wife which is factually incorrect and, in fact, the concept of desertion, as is understood

in law, has not been proven by way of adequate evidence but, on the contrary, the analysis of evidence on record by the Family Court goes a long way to show that there was, in fact, no desertion on the part of the wife to make out a case for divorce. It is his further submission that the High Court has opined that the marriage between the parties had irretrievably been broken and, therefore, it was requisite to grant a decree for dissolution of marriage by divorce which cannot be a ground for grant of divorce. Learned counsel has placed reliance on the decisions in ***Lachman Utamchand Kirpalani v. Meena @ Mota***[1]***, K. Narayanan v. K. Sreedevi***[2]***, Mohinder Singh v. Harbens Kaur***[3] ***and Smt. Indira Gangele v. Shailendra Kumar Gangele***[4]**.**

14. Mr. Balaji Srinivasan, learned counsel for the respondent-husband, has urged that if the petition filed by the husband is read in entirety, it would be clear that the husband had clearly pleaded about the mental hurt and trauma that he had suffered because of the treatment meted out to him by his wife and her family members. He has drawn our attention to the evidence to show that for a long seven and a half years despite the best efforts he could not get marital cooperation from his wife and as the High Court has accepted the same, the impugned judgment is flawless. He has highlighted about the nonresponsive proclivity of the wife when she chose not to reply to the letters of the husband beseeching her to join his company while she was staying at Gulbarga. He has also drawn our attention to the cross-examination of the husband where he has deposed that after the delivery of the son on 12.1.1998 when she was discharged, he and his mother had gone to bring the wife and the child to their home but she went to her parental home and further neither he nor his family members were invited for the naming ceremony which was performed in October, 1998. Learned counsel has drawn our attention to the subsequent events which have been brought on record by way of affidavit as well as the rejoinder filed by the appellant-wife to the counter affidavit to highlight the subsequent conduct for the purpose of demonstrating the cruel treatment of the wife. It is canvassed by him that the subsequent events can be taken note of for the purpose of mental cruelty by this Court and the decree of divorce granted by the High Court should not be disturbed.

15. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the petition and the evidence adduced by the parties and the judgment of the Family Court and that of the High Court. The plea that was raised for grant of divorce was under Section 13(1)(ib) of the Act. It provides for grant of divorce on the ground of desertion for a continuous period of not less than two year immediately preceding the presentation of the petition. The aforesaid provision stipulates that a husband or wife would be entitled to a dissolution of marriage by decree of divorce if the other party has deserted the party seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition. Desertion, as a ground for divorce, was inserted to Section 13 by Act 68/1976. Prior to the amendment it was only a ground for judicial separation. Dealing with the concept of desertion, this Court in ***Savitri Pandey v. Prem Chandra Pandey***[5] has ruled thus:-

> *"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the*

1 AIR 1964 SC 40
2 AIR 1990 Ker 151
3 AIR 1992 P&H 8
4 AIR 1993 MP 59
5 (2002) 2 SCC 73

obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shah v. Prabhavati[1] *held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion.*

16. In the said case, reference was also made to Lachman Utamchand Kirpalani's case wherein it has been held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

17. In the case at hand, the Family Court, on the basis of the evidence brought on record, has recorded a finding that there was no desertion for a continuous period of two years. The High Court has reversed it by emphasizing on certain aspects of conduct. Analysing the evidence, we are of the considered opinion that it is not established that the appellant-wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. It is because the petition was presented in the year 2001 and during the cross-examination of the husband it has been admitted by him that he had gone to Gulbarga in May, 1999 for two days. The Family Court, on the basis of material brought on record, has opined that there is no sufficient evidence to come to a definite conclusion that the wife deserted him with intention to bring the matrimonial relationship to an end and further the period of two years was not completed. The High Court, as it seems to us, has not dealt with this aspect in an appropriate manner and opined that the wife had no intention to lead a normal married life with the husband.

    Therefore, the allegation of desertion, as enshrined under Section 13(1)(ib) has not been established. The finding on that score as recorded by the learned Principal Judge, Family Court, deserves to be affirmed and we so do.

18. Presently to the factual matrix in entirety and the subsequent events. We are absolutely conscious that the relief of dissolution of marriage was sought on the ground of desertion. The submission of the learned counsel for the appellant is that neither subsequent events nor the plea of cruelty

could have been considered. There is no cavil over the fact that the petition was filed under Section 13(1)(ib). However, on a perusal of the petition it transpires that there are assertions of ill-treatment, mental agony and torture suffered by the husband.

19. First we intend to state the subsequent events. As has been narrated earlier, after the application of the wife was allowed granting restitution of conjugal rights, the husband communicated to her to join him, but she chose not to join him immediately and thereafter went to the matrimonial home along with a relative who is a police officer. After she stayed for a brief period at the matrimonial home, she left her husband and thereafter lodged FIR No. 401/2004 on 17.10.2004 for the offences under Sections 498A and 506/34 of the Indian Penal Code and the provisions under Dowry Prohibition Act, 1961 against the husband, his mother and the sister. Because of the FIR the husband was arrested and remained in custody for a day. The ladies availed the benefit of anticipatory bail. The learned trial Magistrate, as we find, recorded a judgment of acquittal. Against the judgment of acquittal, the appellant preferred an appeal before the High Court after obtaining special leave which was ultimately dismissed as withdrawn since in the meantime the State had preferred an appeal before the Court of Session. At this juncture, we make it absolutely clear that we will not advert to the legal tenability of the judgment of acquittal as the appeal, as we have been apprised, is subjudice. However, we take note of certain aspects which have been taken note of by the High Court and also brought on record for a different purpose.

20. The seminal question that has to be addressed is whether under these circumstances the decree for divorce granted by the High Court should be interfered with. We must immediately state that the High Court has referred to certain grounds stated in the memorandum of appeal and taken note of certain subsequent facts. We accept the submission of the learned counsel for the appellant that the grounds stated in the memorandum of appeal which were not established by way of evidence could not have been pressed into service or taken aid of. But, it needs no special emphasis to state that the subsequent conduct of the wife can be taken into consideration. It settled in law that subsequent facts under certain circumstances can be taken into consideration.

21. In ***A. Jayachandra v. Aneel Kaur***[6] it has been held thus: -

> *"If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct."*

22. In ***Suman Kapur v. Sudhir Kapur***[7] this Court had accepted what the High Court had taken note of despite the fact that it was a subsequent event. It is necessary to reproduce the necessary paragraphs from the said decision to perceive the approach of this Court: -

> *"46. The High Court further noted that the appellant wife sent a notice through her advocate to the respondent husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income tax return, the husband mentioned the social security number of his wife as 476-15-6010, a number which did not belong to the appellant wife, but to some American lady (Sarah Awegtalewis).*

6 (2005) 2 SCC 22

7 (2009) 1 SCC 422

47. The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving social security number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in social security number, the appellant wife had gone to the extent of making serious allegation that the respondent had married an American woman whose social security number was wrongly typed in the income tax return of the respondent husband."

23. From the acceptance of the reasons of the High Court by this Court, it is quite clear that subsequent events which are established on the basis of non-disputed material brought on record can be taken into consideration. Having held that, the question would be whether a decree for divorce on the ground of mental cruelty can be granted. We have already opined that the ground of desertion has not been proved. Having not accepted the ground of desertion, the two issues that remain for consideration whether the issue of mental cruelty deserves to be accepted in the obtaining factual matrix in the absence of a prayer in the relief clause, and further whether the situation has become such that it can be held that under the existing factual scenario it would not be proper to keep the marriage ties alive. Learned counsel for the appellant has urged with vehemence that when dissolution of marriage was sought on the ground of desertion alone, the issue of mental cruelty can neither be raised nor can be addressed to. Regard being had to the said submission, we are constrained to pose the question whether in a case of the present nature we should require the respondent-husband to amend the petition and direct the learned Family Judge to consider the issue of mental cruelty or we should ignore the fetter of technicality and consider the pleadings and evidence brought on record as well as the subsequent facts which are incontrovertible so that the lis is put to rest. In our considered opinion the issue of mental cruelty should be addressed to by this Court for the sake of doing complete justice. We think, it is the bounden duty of this Court to do so and not to leave the parties to fight the battle afresh after expiry of thirteen years of litigation. Dealing with the plea of mental cruelty which is perceptible from the material on record would not affect any substantive right of the appellant. It would be only condoning a minor technical aspect. Administration of justice provokes our judicial conscience that it is a fit case where the plentitude of power conferred on this Court under Article 142 deserves to be invoked, more so, when the ground is statutorily permissible. By such exercise we are certain that it would neither be supplanting the substantive law nor would it be building a structure which does not exist. It would be logical to do so and illogical to refrain from doing so.

24. Before we proceed to deal with the issue of mental cruelty, it is appropriate to state how the said concept has been viewed by this Court. In ***Vinit Saxena v. Pankaj Pandit***[8], while dealing with the issue of mental cruelty, the Court held as follows: -

"31. It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as

8 (2006) 3 SCC 778

to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

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35. Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered."

25. In ***Samar Ghosh v. Jaya Ghosh***[9], this Court has given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Court itself has observed that they are illustrative and not exhaustive. We think it appropriate to reproduce some of the illustrations:-

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

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(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

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(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

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(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

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(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

26. In the said case the Court has also observed thus:-

9 (2007) 4 SCC 511

"99. … The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances…."

27. In ***Vishwanath Agrawal, s/o Sitaram Agrawal v. Sarla Vishwanath Agrawal***[10], while dealing with mental cruelty, it has been opined thus: -

"22. The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status."

28. In the said case, analyzing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows: -

"In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."

29. In ***U. Sree v. U. Srinivas***[11], the Court, taking note of the deposition of the husband that the wife had consistently ill treated him inasmuch as she had shown her immense dislike towards his "sadhna" in music and had exhibited total indifference to him, observed as follows: -

"It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him remarried for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family."

10 (2012) 7 SCC 288

11 (2013) 2 SCC 114

30. In ***K. Srinivas Rao v. D.A. Deepa***[12], while dealing with the instances of mental cruelty, the court opined that to the illustrations given in the case of Samar Ghosh certain other illustrations could be added. We think it seemly to reproduce the observations: -

> *"Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."*

31. Presently, we shall advert to the material on record. It is luminous from it that the wife has made allegations that the sister and brother-in-law of the husband used to interfere in the day-to-day affairs of the husband and he was caught in conflict. The said aspect has really not been proven. It has been brought on record that the sister and brother-in-law are highly educated and nothing has been suggested to the husband in the cross-examination that he was pressurized by his sister in any manner whatsoever. It is her allegation that the sister and brother-in-law of the husband were pressurizing him not to allow the wife to prosecute higher studies and to keep her as an unpaid servant in the house. On a studied evaluation of the evidence and the material brought on record it is demonstrable that the wife herself has admitted that the husband had given his consent for her higher education and, in fact, assisted her. Thus, the aforesaid allegation has not been proven. The allegation that the husband was instigated to keep her at home as an unpaid servant is quite a disturbing allegation when viewed from the spectrum of gender sensitivity and any sensitive person would be hurt when his behavior has remotely not reflected that attitude. The second aspect which has surfaced from the evidence is that the wife had gone to the parental home for delivery and therefrom she went to the hospital where she gave birth to a male child. However, as the evidence would show, the husband despite all his co-operation as a father, when had gone to the hospital to bring the wife and child to his house, she along with the child had gone to her parental house. This aspect of the evidence has gone totally unchallenged. Perceived from a social point of view, it reflects the egocentric attitude of the wife and her non-concern how such an act is likely to hurt the father of the child. The next thing that has come in evidence is that the respondent was not invited at the time of naming ceremony. He has categorically disputed the suggestion that he and his family members were invited to the ceremony. It is interesting to note that a suggestion has been given that they did not attend the ceremony as in the invitation card the names of the parents of the husband had not been printed. It has been asserted by the husband that the said incident had caused him tremendous mental pain. View from a different angle, it tantamounts to totally ignoring the family of the husband.

32. Another incident deserves to be noted. The wife went to Gulbarga to join her studies and the husband was not aware of it and only come to know when one professor told about it. Thereafter he went to Gulbarga and stayed in a hotel and met the wife in the hostel on both the days. Despite his request to come to the house she showed disinclination. When he enquired about the child, he was told that the child was in her mother's house. These are the incidents which are antecedent to the filing of the petition.

33. We have already stated the legal position that subsequent events can be taken note of. After the judgment and decree was passed by the learned Family Judge, the husband sent a notice through his counsel dated 14.7.2004 and intimated her as follows: -

12 (2013) 5 SCC 226

"According to the operative portion of the order, my client has to welcome you to join him with the child within three months which please note.

My client's address is Dr. B.V. Ravi, M.D., residing in No. 428. 2nd Across, 6th Main, 3rd Stage, 3rd Block, Basaveshwaranagar, Bangalore-79 and his Telephone No. 23229865. In obedience to the Hon'ble Court order, you called upon to join Dr. B.V. Ravi to the above said address any day after 18th of July, 2004, as this period upto 17th is inauspicious because of "Ashada"."

34. As it appears, she did not join and the husband was compelled to send a telegram. Thereafter, on 13.8.2004 a reply was sent on her behalf that she would be joining after 15.8.2004 but the exact date was not intimated. Thereafter, on 14.8.2004 a reply was sent to the legal notice dated 14.7.2004 sent by the husband. It is appropriate to reproduce the relevant two paragraphs: -

"In this context, we hereby inform you that our client will be coming to join your client in the above said address along with the child on Sunday the 22nd August 2004 as the auspicious NIJASHRAVANA MONTH commences from 16th August 2004.

Further our client expects reasonable amount of care and cordiality from your client's side. Please ensure the same."

35. The purpose of referring to these communications is that despite obtaining decree for restitution of conjugal rights the wife waited till the last day of the expiration of the period as per the decree to join the husband. There may be no legal fallacy, but the attitude gets reflected. The reply also states that there is expectation of reasonable amount of care and cordiality. This reflects both, a sense of doubt and a hidden threat. As the facts unfurl, the wife stays for two months and then leaves the matrimonial home and lodges the first information report against the husband and his mother and sister for the offences punishable under Sections 498A, 506/34 of the Indian Penal Code and under the provisions of Dowry Prohibition Act. The husband suffers a day's custody and the mother and the sister availed anticipatory bail.

36. The High Court has taken note of all these aspects and held that the wife has no intention to lead a normal marital life. That apart, the High Court has returned a finding that the marriage has irretrievably been broken down. Of course, such an observation has been made on the ground of conduct. This Court in certain cases, namely, ***G.V.N. Kameswara Rao v. G. Jabilli[13], Parveen Mehta v. Inderjit Mehta[14], Vijayakumar R. Bhate v. Neela Vijayakumar Bhate[15], Durga Prasanna Tripathy v. Arundhati Tripathy[16], Naveen Kohli v. Neelu Kohli[17] and Samar Ghosh v. Jaya Ghosh (supra)***, has invoked the principle of irretrievably breaking down of marriage.

37. For the present, we shall restrict our delineation to the issue whether the aforesaid acts would constitute mental cruelty. We have already referred to few authorities to indicate what the concept of mental cruelty means. Mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be a mental cruelty in the life of two individuals belonging

13 (2002) 2 SCC 296
14 (2002) 5 SCC 706
15 (2003) 6 SCC 334
16 (2005) 7 SCC 353
17 (2006) 4 SCC 558

to particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society.

The agonized feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances. As we have enumerated the incidents, we are disposed to think that the husband has reasons to feel that he has been humiliated, for allegations have been made against him which are not correct; his relatives have been dragged into the matrimonial controversy, the assertions in the written statement depict him as if he had tacitly conceded to have harboured notions of gender insensitivity or some kind of male chauvinism, his parents and he are ignored in the naming ceremony of the son, and he comes to learn from others that the wife had gone to Gulbarga to prosecute her studies. That apart, the communications, after the decree for restitution of conjugal rights, indicate the attitude of the wife as if she is playing a game of Chess. The launching of criminal prosecution can be perceived from the spectrum of conduct. The learned Magistrate has recorded the judgment of acquittal. The wife had preferred an appeal before the High Court after obtaining leave. After the State Government prefers an appeal in the Court of Session, she chooses to withdraw the appeal. But she intends, as the pleadings would show, that the case should reach the logical conclusion. This conduct manifestly shows the widening of the rift between the parties. It has only increased the bitterness. In such a situation, the husband is likely to lament in every breath and the vibrancy of life melts to give way to sad story of life.

38. From this kind of attitude and treatment it can be inferred that the husband has been treated with mental cruelty and definitely he has faced ignominy being an Associate Professor in a Government Medical College. When one enjoys social status working in a Government hospital, this humiliation affects the reputation. That apart, it can be well imagined the slight he might be facing. In fact, the chain of events might have compelled him to go through the whole gamut of emotions. It certainly must have hurt his self-respect and human sensibility. The sanguine concept of marriage presumably has become illusory and it would not be inapposite to say that the wife has shown anaemic emotional disposition to the husband. Therefore, the decree of divorce granted by the High Court deserves to be affirmed singularly on the ground of mental cruelty.

39. Presently, we shall proceed to deal with grant of maintenance. Both the appellant and the respondent are doctors and have their respective jobs. The son is hardly sixteen years old and definitely would require financial support for education and other supportive things to lead a life befitting his social status. The High Court, while granting a decree for divorce should have adverted to it. However, we do not think it appropriate to keep anything alive in this regard between the parties. The controversy is to be put to rest on this score also. Considering the totality of circumstances, the status the appellant enjoys and the strata to which the parties belong, it becomes the bounden duty of the respondent to provide for maintenance and education for the son who is sixteen years old. At this juncture, we may note that a proceeding was initiated before the learned Principal Judge, Family Court, Bangalore and in the said proceeding the learned Principal Judge passed the following order: -

"Matter is settled before the mediation centre where in parties have entered into a memorandum of settlement.

Contents of the Memorandum of Settlement are admitted by the Parties. Court is satisfied that the same is voluntary. As per the terms of settlement para 5 clause (i) petitioner has deposited Rs.3,00,000/- in the name of minor child in Karnataka Bank, copy of fixed deposit receipt and R.D. Account pass book are filed along with memo. Hence petition is allowed in terms of settlement. Memorandum of settlement shall be a part of the decree."

40. Learned counsel for the respondent would submit that the amount has been settled. Though there has been a settlement of Rs.3,00,000/- yet that was at a different time and under different circumstances. The present appeal was pending. The duty of this Court is to see that the young son born in the wedlock must get acceptable comfort as well as proper education. It is the duty of the Court also to see that a minor son should not live in discomfort or should be deprived of requisite modern education. We are conscious, the appellant is earning but that does not necessarily mean that the father should be absolved of his liability. Regard being had to the social status and strata and the concept of effective availing of education we fix a sum of Rs.25,00,000/- (twenty five lacs) excluding the amount already paid towards the maintenance and education of the son. The said amount shall be deposited by the respondent within a period of six months before the learned Principal Judge, Family Court at Bangalore and the amount shall be kept in a fixed deposit in a nationalized bank in the joint account of the appellant and the minor son so that she can draw quarterly interest and expend on her son. After the son attains majority the joint account shall continue and they would be at liberty to draw the amount for the education or any urgent need of the son.

41. With the aforesaid directions, we affirm the decree for divorce passed by the High Court. The appeal stands disposed of accordingly but without any order as to costs.

[Sudhansu Jyoti Mukhopadhaya]
[Dipak Misra]

New Delhi;

June 30, 2014.

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SUMAN KAPUR VS SUDHIR KAPUR

In the Supreme Court of India
Civil Appellate Jurisdiction

(2009) 1 SCC 422

Civil Appeal No. 6582 of 2008
Arising out of Special Leave Petition (Civil) No. 10907 of 2007
(Before Hon'ble Mr. Justice C.K. Thakker & Hon'ble Mr. Justice D.K. Jain, JJ.)

Suman Kapur ...Appellant
Versus
Sudhir Kapur ...Respondent

Abortion by a woman without her husband's knowledge and consent will amount to mental cruelty and a ground for divorce, the Supreme Court has held.

"Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of the other for a long time may lead to mental cruelty. A sustained course of abusive and humiliating treatment calculated to torture, discommode or render life miserable for the spouse," said a Bench consisting of Justices C.K. Thakker and D.K. Jain.

It was held: "The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty. Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness, causing injury to mental health or deriving sadistic pleasure, can also amount to mental cruelty."

The conduct must be much more than jealousy, selfishness, possessiveness, which caused unhappiness and dissatisfaction and emotional upset but might not be a reason for grant of divorce on the ground of mental cruelty.

Absence of intention

It was held: "To establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs the act complained of could otherwise be regarded as cruelty. Mens rea is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill treatment."

"Mere coldness or lack of affection cannot amount to cruelty; frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable."

In the instant case, Suman Kapur was aggrieved at the decree of divorce granted against her by a trial court and confirmed by the Delhi High Court. Both courts gave a finding that her three abortions without the knowledge and consent of her husband, Sudhir Kapur, was a valid ground

for divorce. Disposing of the appeal, the Bench noted that Sudhir Kapur got remarried on March 5, 2007 before the expiry of the period of 90 days for filing appeal before this court and a child was born from the second marriage.

"Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both courts, i.e. the trial court as well as the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have remarried before the expiry of period stipulated for filing appeal. Ends of justice would be met if we direct the respondent to pay Rs. 5 lakh to the appellant."

JUDGMENT

C.K. THAKKER, J.

1. Leave granted.

2. The present appeal is filed by the appellant-wife being aggrieved and dissatisfied with the decree of divorce dated August 07, 2004 passed by the Additional District Judge, Delhi in HMA No. 322/2001/96 and confirmed by the High Court of Delhi on January 29, 2007 in Matrimonial Appeal No. 62 of 2004.

3. The facts in nutshell are that the appellant Suman Kapur is the wife and respondent Sudhir Kapur is the husband. The matrimonial alliance was entered into between the parties as per Hindu rites and rituals in Delhi on March 04, 1984. It was the case of the appellant that both the parties were friends from childhood and were knowing each other since 1966. They had also studied together in the same school. They were very close since 1974 and after a friendship of more than a decade, they decided to marry. The marriage was inter-caste marriage. Though initially parents of both the parties were opposed to the marriage, subsequently, they consented. The parties have no issue from the said wedlock.

4. The appellant has a brilliant academic record and has been the recipient of the prestigious Lalor Foundation Fellowship of United States of America (USA), offered to young scientists for outstanding performance in the area of research. According to her, at the time of her marriage, she was in employment with the Department of Bio-chemistry in the All India Institute of Medical Sciences (AIIMS) and was also pursuing her Ph.D.

5. It is the case of the appellant that she conceived for the first time in 1984, within a period of about one month of the marriage, but on account of being exposed to harmful radiations as a part of lab work of her Ph.D. thesis, she decided to terminate the pregnancy. The appellant asserted that it was done with the knowledge and consent of the respondent-husband.

6. Again, in 1985, she conceived. But even that pregnancy was required to be terminated on the ground of an acute kidney infection for which she had to undergo an IVP, which entailed six abdominal X-rays and radiometric urinary reflect test with radioactive drinking dye. She claimed that even the second pregnancy was terminated with the knowledge and consent of the respondent- husband.

7. According to the appellant, third time she became pregnant in 1989, but she suffered natural abortion on account of having a congenitally small uterus and thus prone to recurrent miscarriages.

8. It is the case of the appellant that though she was well-placed and having good job in AIIMS in Delhi, only with a view to accompany her husband who was serving in Bombay, she left the job. In 1988, the parties together left for USA. The appellant was awarded Lalor Foundation Fellowship in USA for which she had to move to Kansas city and could not join the respondent-husband at the place of his work.

9. The case of the respondent-husband, on the other hand was that since solemnization of marriage between the parties, the attitude, conduct and behaviour of the appellant-wife towards the respondent as well as his family members was indignant and rude. It was alleged by him that first pregnancy was terminated in 1984 by the appellant-wife without consent and even without knowledge of the respondent. Same thing was repeated at the time of termination of second pregnancy in 1985. He was kept in complete dark about the so-called miscarriage by the appellant-wife in 1989. The respondent was thus very much aggrieved since he was denied the joy of feeling of fatherhood and the parents of the respondent were also deprived of grand-parenthood of a new arrival. It was also contended by the respondent that the attitude of the appellant-wife towards her in-laws was humiliating. Several instances were cited in support of the said conduct and behaviour by the husband.

10. The respondent-husband, therefore, filed HMA No. 322/2001/96 in the Court of Additional District Judge, Delhi under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as `the Act') for getting divorce from the appellant-wife. Two grounds were taken by the respondent-husband in the said petition, i.e. (i) cruelty and (ii) desertion. It was alleged by the husband that the wife was all throughout conscious, mindful and worried of one thing and that was her career. In view of her thinking only in one direction, she deprived the respondent-husband of conjugal rights and matrimonial obligations. She also treated the family members of the respondent-husband with cruelty. She, without consent or even knowledge of the respondent- husband, got her pregnancy terminated twice in 1984 as well as in 1985 and falsely stated that there was natural miscarriage at the time of third pregnancy in 1989. At no point of time, she had taken consent of the husband nor even she had informed about the termination of pregnancy or about miscarriage to the respondent. At several occasions, she had stated that she was not interested at all in living with the respondent-husband and to perform marital obligations. She had made it explicitly clear to the respondent-husband that she was not willing to be a mother at the cost of her career. She had specifically told the respondent-husband that if he was very much interested and eager to be a father and his mother (respondent's mother) wanted to be a grand-mother, he could enter into marriage tie with any other woman, but the appellant-wife would not give up her career. She had also stated that she had no objection if the respondent adopts a child which action would not adversely affect her career. She had issued a notice to the respondent-husband that it would be better that they would peacefully separate from each other so that the respondent-husband may be able to fulfil the wishes of his parents and the appellant-wife may pursue her future career. The respondent- husband, therefore, submitted that the case attracted both the provisions, viz. (i) cruelty on the part of the wife under clause (ia) of sub-section (1) of Section 13 and (ii) desertion of matrimonial home and refusal to perform marital obligations falling under clause (ib) of sub-section (1) of Section 13 of the Act. On both the grounds, the respondent- husband was entitled to a decree of divorce.

11. The appellant-wife in her objections denied the allegations of the husband. According to her, she was doing her best to please her husband as well as her in-laws. Precisely for that purpose,

she had left her service in Delhi and joined the husband. It was admitted that she was in service and was also interested in career as she was well- educated lady and wanted to contribute to the society. But that did not mean that she was not performing her marital obligations. It was an admitted fact that immediately after her marriage, she conceived and she was very happy about it. Unfortunately, however, for the circumstances beyond her control, she was compelled to get the pregnancy terminated with the knowledge and consent of her husband. The same thing was repeated in 1985. In 1989, there was natural miscarriage. She also contended that she had to go to USA for receiving prestigious award of Lalor Foundation Fellowship. According to her, instead of being happy about the progress of the wife, the husband had initiated the present proceedings with jealousy and hence, he was not entitled to a decree of divorce. Even otherwise, there was no cruelty on her part. According to the wife, during regular intervals, the parties used to stay together and the appellant had never refused to perform her matrimonial obligations or even had shown her intention to deprive the husband of conjugal rights. It was, therefore, submitted that the husband was not entitled to the relief sought by him and the petition was liable to be dismissed.

12. The trial Court after hearing the parties held that the husband was not entitled to a decree of divorce on the ground that the wife had deserted the husband for a continuous period of not less than two years immediately preceding the presentation of the petition. He, however, held that it was fully established by the husband that there was cruelty on the part of the wife. The wife without the knowledge and consent of the husband got her pregnancy terminated twice - firstly in 1984 and secondly in 1985. The husband was also not informed about natural miscarriage in 1989. A finding was also recorded by the trial Court that the wife was not ready and willing to perform matrimonial obligations and she always attempted to stay away from her husband by depriving conjugal rights of the husband. It was, therefore, a case of mental cruelty. The trial Court also referred to several letters written by wife to the husband, and notice issued by the wife through an advocate which went to show that she was not interested in performing marital obligations and continuing marital relations with the husband. The Court also relied upon various entries made by the appellant-wife in her diary which suggested that all throughout she was worrying about her future and her career. For wife, according to the trial Court, her career was the most important factor and not matrimonial obligations. The trial Court, therefore, held that the case was covered by mental cruelty which was shown by the wife towards the husband and the husband was entitled to a decree of divorce on that ground.

13. Being aggrieved by the decree passed by the trial Court, the wife preferred an appeal in the High Court of Delhi. The High Court again appreciated the evidence on record and confirmed the decree of divorce passed by the trial Court. The High Court, however, held that it was not necessary for the Court to consider mental cruelty so far as termination of pregnancy was concerned, since in the opinion of the High Court, even otherwise from the letters and entries in diary, it was proved that there was mental cruelty on the part of the wife. Accordingly, the decree of divorce passed by the trial Court was confirmed by the High Court.

14. The said order has been challenged in the present proceedings. On July 16, 2007, notice was issued by this Court. The respondent appeared and affidavit-in-reply and affidavit-in-rejoinder were thereafter filed. Considering the nature of controversy, the Registry was directed to place the matter for final hearing and accordingly, the matter has been placed before us.

15. We have heard the learned counsel for the parties.

16. The learned counsel for the appellant contended that both the courts had committed an error of law in granting a decree of divorce against the appellant-wife. It was submitted that the courts below ought not to have held that there was mental cruelty on the part of the appellant-wife and the respondent-husband was entitled to a decree of divorce on that ground. It was also submitted that once the High Court has not considered the allegation as to termination of pregnancy without the consent of the husband, no decree for divorce on the ground of mental cruelty could have been passed by it. Even if all the allegations leveled against the wife had been accepted, they were in the nature of `normal wear and tear' in a matrimonial life of a couple which would not fall within the mischief of clause (ia) of sub- section (1) of Section 13 of the Act and the orders passed by the courts below are liable to be set aside. It was further submitted that even otherwise, the wife is entitled to an appropriate relief from this Court inasmuch as from the evidence, it is clearly established that the High Court confirmed the decree passed by the trial Court on January 29, 2007 and before the period of filing Special Leave to Appeal to this Court expires, the respondent- husband entered into re-marriage with a third party and from the said wedlock, he is having an issue. It was, therefore, submitted that the husband has created a situation which had seriously prejudiced the appellant and the Court may not allow the respondent-husband to take undue advantage of the situation created by him.

17. The learned counsel for the respondent-husband, on the other hand, supported the decree passed by the trial Court and confirmed by the High Court. It was urged that the trial Court on the basis of evidence adduced by the parties recorded a finding of fact that the conduct and behaviour of the wife was in the nature of mental cruelty and accordingly allowed the petition filed by the husband. The High Court, though convinced on all grounds, did not think it fit to enter into correctness or otherwise of the finding recorded with regard to illegal termination of pregnancy by wife without the knowledge and consent of the husband since it was convinced that even otherwise on the basis of evidence on record, mental cruelty of the wife was established. It was not necessary for the High Court to consider and to record a finding as to illegal termination of pregnancy by wife since the decree passed by the trial Court could be confirmed. As far as mental cruelty is concerned, on the basis of other evidence and material on record, a finding had been recorded by the trial Court. The said finding was a finding of fact which was confirmed by the High Court. In exercise of jurisdiction under Article 136 of the Constitution, this Court will not interfere with the said finding and hence the appeal deserves to be dismissed.

18. Regarding re-marriage by the husband, it was stated that after the decree of divorce passed by the trial Court, the husband did not re-marry. But the decree of divorce was confirmed by the High Court. The husband thereafter had taken the action which cannot be said to be illegal or otherwise unlawful. The wife, therefore, cannot take a technical contention that the husband should have waited till the period of filing Special Leave to Appeal to this Court would expire. It was, therefore, submitted that the appeal deserves to be dismissed.

19. Having heard the learned counsel for the parties, on the facts and in the circumstances of the case, in our opinion, it cannot be said that by recording a finding as to mental cruelty by the wife against the husband, the Courts below had committed any illegality.

20. Section 13 of the Hindu Marriage Act provides for grant of divorce in certain cases. It enacts that any marriage solemnized whether before or after the commencement of the Act may be dissolved on a petition presented either by the husband or by the wife on any of the grounds specified therein. Clause (ia) of sub- section (1) of Section 13 declares that a decree of divorce

may be passed by a Court on the ground that after the solemnization of marriage, the opposite party has treated the petitioner with cruelty.

21. Now, it is well-settled that the expression `cruelty' includes both (i) physical cruelty; and (ii) mental cruelty. The parties in this connection, invited our attention to English as well as Indian authorities. We will refer to some of them.

Mental Cruelty

22. The concept of cruelty has been dealt with in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under;

> *"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse".*

23. In Gollins V. Gollins 1964 AC 644: (1963)2 All ER 966, Lord Reid stated:

> *"No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so. Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weakness of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health".*

24. Lord Pearce also made similar observations;

> *"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from normal standards of conjugal kindness causes injury to health or an apprehension of it, is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would considered that the conduct complained of is such that this spouse should not be called on to endure it".*

[see also Russell v. Russell, (1897) AC 395 : (1895-99) All ER Rep 1].

25. The test of cruelty has been laid down by this court in the leading case of N.G. Dastane v. S. Dastane, (1975)2 SCC 326 thus:

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent...."

26. In Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr., (1981) 4 SCC 250, this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. It was further stated that to establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty.

27. In Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105, this Court examined the concept of cruelty. It was observed that the term `cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(ia) of the Act in the context of human conduct and behavior in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one spouse which adversely affects the other spouse. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of degree which is relevant. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the other spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Mens rea is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

28. In V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337, the Court observed;

"Mental Cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such unintentional. If it is physical, it is a question of fact and degree.

If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as

cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment or conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made".

29. This Court in Chetan Dass v. Kamla Devi, (2001) 4 SCC 250, stated;

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case".

30. Mental cruelty has also been examined by this Court in Parveen Mehta v. Inderjit Mehta(2002) 5 SCC 706 thus;

"Cruelty for the purpose of Section 13 (1)(ia) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental Cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

31. In A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22, the Court observed as under:

> *"The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial dispute."*

32. In Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778, the Court said;

> *"It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such willful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.*
>
> *The word "cruelty" has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted".*

33. It was further stated:

"Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters.

The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellants, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The Court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure."

34. Recently, in Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, this Court held;

"No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of `mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental Cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty".

35. Now, coming to the facts of the case, from the evidence of Smt. Vimal Kapur (mother- in-law of appellant-wife and mother of respondent-husband) who is examined as PW 1 and Sudhir Kapur, husband-PW 2, the trial Court held that the wife was interested in her career only and she had neglected towards matrimonial obligations and exercise of conjugal rights by the husband. The trial Court also held that termination of pregnancy by wife was without consent or even knowledge of the husband which was in the nature of mental cruelty. But keeping

the said element of mental cruelty aside, the High Court was convinced that the allegation of mental cruelty towards the husband by the wife was clearly established from the evidence on record adduced by the respondent-husband. The High Court noted that the appellant-wife was constantly and continuously avoiding staying with the husband and preventing him to have matrimonial relations. From the letters of the appellant- wife also, the High Court held that it was the wife who had stated that she had completely lost interest in the marriage and she was willing to get divorce. The High Court further noted that the appellant-wife sent a notice through her advocate to the respondent-husband during the pendency of mediation proceedings in the High Court wherein she alleged that the respondent was having another wife in USA whose identity was concealed. This was based on the fact that in his income-tax return, the husband mentioned the Social Security Number of his wife as 476-15-6010, a number which did not belong to the appellant-wife, but to some American lady (Sarah Awegtalewis). The High Court, however, recorded a finding of fact accepting the explanation of the husband that there was merely a typographical error in giving Social Security Number allotted to the appellant which was 476-15-6030. According to the High Court, taking undue advantage of the error in Social Security Number, the appellant wife had gone to the extent of making serious allegation that the respondent had married to an American woman whose Social Security Number was wrongly typed in the income tax return of the respondent-husband.

36. The High Court also observed that the appellant wanted to pursue her professional career to achieve success. In her written statement itself, she had admitted that she was very much interested in her career; that she was independent since 1979 and she was keen to live independent life.

37. The High Court also took a serious note of an entry in the personal diary of the appellant-wife dated September 14, 1986 wherein she stated;

> *"I said, "we started this journey as two individuals and if you can do so fine otherwise forget and don't bring the ghost of parents in between the two of us. He did not like the use of words ghosts and first cursed my vocabulary and then he said "you do not have any, but I have better ties". At this I told him you are given these 15 days and you can find another wife for yourself. He has this notion that he will go to USA (NY) and I will stay with his parents and I told him I will not and he says this was the deal in July and when I refuted he said "no you had promised". I told him you have just now paid the fine and you are again using the same tricks again. Naturally, he did not like and said to me "I am not and have never with you played tricks". I said sorry- I do not trust you any further and he said it is your fault. It may now be my fault but I think it is just quits. I don't think I will write to anybody back in Delhi now for 15 days and if I can find myself work here any kind".*

38. From the above letter, it is clear that the appellant-wife had described the parents of the husband as `ghost'.

39. In the letter dated June 21, 1988, she stated;

> *"I really wish you would understand my urge in pursuing my freedom away from the hawk eyes of your mother, sister and all other relatives. But, as I am not ready to share the economic gains of this job with you and other family members. I don't expect either you or them to understand my need and commitment for this job, or any job. I am*

bound to cause friction with so many people around me- I was at war with just you around me in Bombay."

40. In another letter, she stated that the respondent-husband should not make a condition for the wife of living together. She stated;

"I am not a good person to waste all your potential, emotion on. I do not deserve it.

... ...

Please do not make living together a condition for the coming few months. And do not read from these lines that I do not miss you- I do so individually and circumstantially- but as is my way of working I am not ready to stop myself for bonds and I believe the same for you. I wish the best and topmost for you-the most perfect, one can hope to be and wish that nothing becomes a barrier between you and you and your achievements. Even me. It will be best if we could help each other constructively; I also believe that we can do so- it is just that we believe in different things.

... ...

If possible, stand out of all this mess and try to work the best possible solution for us and your family. I do want you to remember that you are only one son and your family commitments. I would honour- but not at the cost of my spiritual search in life."

41. She further said that the respondent- husband should not bring her marital status preventing her from pursuing her career in the name of marriage. She stated that when she was unable to give even a child to the respondent- husband, up to what stage, they should live together. She clarified that she did not want to close her avenues in life at least at that stage. She also did not want to forego her chances whatever she would believe about her chances. She did not believe in love any more. She expressly stated that she did not believe in Indian social value system and she was very happy in the foreign country.

42. She stated;

"Mujhe is vivah ke naam per apne raste se mat roke. Ho sakta he mein he galat hoon- per mujhe nahin lagta. Dampati ke tarah hum saath ji liye hein- purani quality of life se kuch neechey hi star per jiye hein- ye aur koin jaane ya na jaane- Cambridge school se ek dosre ko bada hota dekh suman- sudhir achhey se jaante hein. Es vivah mein aapko santan bhi na de saki- phir kahan tak jaruri hai ki hum saath rahe? Aap mere vicharo se to kabhi sahmat nahin honge per auron ki rai kar lein-jis kisiki bhi- apni jindgi suljha lein. Mujh se ye ummid karma chod de ke kisi vyaktigat (per mujh se unrelated) ya samajik karan se abhi mein apna rehne sochne ka tarika badloon. Jaisa maine pehle likha- jindagi ji kar jaise bhi, job hi, jab bhi samajh aayega tabhi aayega, jaise main apne liye chhot chahti hoon vaise he apni oar se jitna mujhe adhikar hein aapko bhi mukt karti hoon. Meine to kareeb chheh page par hi ye patr samapt kar diya-except for some help that I needed for car, etc-buy your fax today was quite unsettling. I don't like to close my avenues in life- at lease not yet. I was naove to believe whatever I did for marriage as a constitution and marriage to you. I am not ready to forgo my chances- whatever I believe to be chances for what I have experienced as being married. I think the best alternative will be you stay in India for some more time. Chances are that even if you get an assignment outside Kansas we would be living separately. So decide for

yourself cause when time comes I am going to do so for myself. I will this time not make a compromise and regret it a few months later and make both our lives miserable. I have done that several times in the past-at least you should have enough of it to stop trying to push me against my belief.

My way of loving is not like that. I do not even believe in love any more. There is no bigger lie that any one could tell another person. I do not even believe in the Indian social value system. So I am better off being here away from every person and every thing that I grew up with. Whenever I have understood things to be a different shade I will decide whether I want to be here or there."

43. The High Court, in contrast, referred to the letters written by the respondent- husband. It noted that those letters were full of love and affection. According to the High Court, the husband tried his level best to keep the marriage tie to subsist and made all attempts to persuade the wife explaining and convincing her about the sacred relations of husband and wife, the need and necessity of child in their life and also feelings of his parents who wanted to become grand parents. According to the High Court, however, nothing could persuade the wife who was only after her career. In the light of the above facts and circumstances, the Court held that the trial Court did not commit any error of fact or of law in passing the decree for divorce on the ground of mental cruelty.

44. The High Court in paragraph 28 of the judgment stated;

"Applying the above principles to the facts of the present case, I feel the respondent has been able to establish and prove `cruelty' under Section 13(1) (ia) of the Act. The conduct of the appellant has been examined above. I have referred to the letters exchanged between the parties during the period 1986 onwards till 1994. Some of the letters have been written by the appellant herself. These letters reveal the conflict and difference between the parties. The present case also reveals that the respondent was bending over his heels to placate and woo the appellant till 1994 but thereafter gave up. The respondent was deeply in love and was emotionally attached to her. He has however over the passage of time developed a hatred and ill-will for the appellant. There is no apparent ground and reason for the same except the conduct of the appellant."

45. We find no infirmity in the approach of the High Court. The finding relating to mental cruelty recorded by the trial Court and confirmed by the High Court suffers from no infirmity and we see no reason to interfere with the said finding.

46. The fact, however, remains and it has been brought to the notice of this Court that the respondent got re-married on March 05, 2007 before the expiry of period of filing Special Leave to Appeal to this Court under Article 136 of the Constitution. It was also stated that a child was born from the said wedlock on December 20, 2007. Thus, the marriage had been performed within a period of ninety days of the order impugned in the present appeal.

47. Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both the courts, i.e. the trial Court as well as by the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have re-married before the expiry of period stipulated for filling Special Leave to Appeal in this Court by the wife.

48. It is true that filing of appeal under Article 136 of the Constitution is not a right of the party. It is the discretion conferred on this Court to grant leave to the applicant to file appeal in appropriate cases. But, since the Constitution allows a party to approach this Court within a period of ninety days from an order passed by the High Court, we are of the view that no precipitate action could have been taken by the respondent-husband by creating the situation of fait accompli. Considering the matter in its entirety, though we are neither allowing the appeal nor setting aside the decree of divorce granted by the trial Court and confirmed by the appellate Court in favour of respondent-husband, on the facts and in the circumstances of the case, in our opinion, ends of justice would be met if we direct the respondent-husband to pay an amount of Rs. Five lakhs to the appellant-wife. The said payment will be made on or before 31st December, 2008.

49. The appeal is disposed of accordingly. The parties will bear their own costs all throughout.

(C.K. THAKKER)
(D.K. JAIN)

NEW DELHI,

November 07, 2008.

❑❑❑

NAVEEN KOHLI VS NEELU KOHLI

Appeal (Civil) 812 of 2004
Date of Judgment: 21/03/2006

(2006) 4 SCC 558

Naveen Kohli
Vs.
Neelu Kohli

(Before Hon'ble Mr. Justice B.N. Agrawal, Hon'ble Mr. Justice A.K. Mathur & Hon'ble Mr. Justice Dalveer Bhandari, JJ.)

It was held that the marriage had been wrecked beyond any hope of salvation, the court held that public interest and the interests of all concerned lay in the recognition, in law, of this fact.

That even though the wife was not agreeable to a divorce by mutual consent and seemed to have resolved to live in agony only to make the life of her husband a miserable hell, public interest lay in the dissolution of the marriage bond. Keeping a sham of a marriage alive in law was held to be more conducive to immorality and potentially more prejudicial to the public interest than the dissolution of marriage. Not granting a divorce under such circumstances was held to be disastrous for the parties. The granting of divorce would offer them the chance, both psychologically and emotionally, to settle down after a while and start a new chapter in life.

The Supreme Court directed that the marriage between Naveen and Neelu Kohli be dissolved, subject to the husband giving Rs 25 lakh to the wife as permanent maintenance.

JUDGMENT

Dalveer Bhandari, J

This appeal is directed against the judgment of the Allahabad High Court dated 07.07.2003 passed by the Division Bench in First Appeal No.323 of 2003.

The appellant and the respondent are husband and wife. The appellant has filed a petition under the Hindu Marriage Act, 1955 for divorce. The Family Court after comprehensively dealing with the matter ordered cancellation of marriage between the parties under Section 13 of the Hindu Marriage Act which was solemnized on 20.11.1975 and directed the appellant to pay Rs.5 lacs as her livelihood allowance. The appellant deposited the amount as directed.

The respondent aggrieved by the said judgment preferred First Appeal before the Division Bench of the Allahabad High Court. After hearing the parties the appeal was allowed and the decree passed by the Family Court, Kanpur City seeking divorce and annulment of the marriage was dismissed.

The appellant aggrieved by the said judgment of the High Court had preferred special leave petition under Article 136 of the Constitution of India. This Court granted special leave to appeal to the appellant.

Brief facts which are necessary to dispose of this appeal are recapitulated.

The appellant, Naveen Kohli got married to Neelu Kohli on 20.11.1975. Three sons were born out of the wedlock of the parties. The appellant constructed three factories with the intention of providing a separate factory for his three sons. He also constructed bungalow no.7/36 A for their residence. The parties got all their three sons admitted and educated in a public school in Nanital. According to the appellant, the respondent is bad tempered and a woman of rude behaviour. After marriage, she started quarrelling and misbehaving with the appellant and his parents and ultimately, the appellant was compelled to leave the parental residence and started to reside in a rented premises from May 1994. According to the version of the appellant, the respondent in collusion with her parents got sufficient business and property transferred in her name.

The appellant alleged that in the month of May 1994, when he along with the respondent and their children visited Bombay to attend the golden jubilee marriage anniversary of his father-in-law, he noticed that the respondent was indulging in an indecent manner and found her in a compromising position with one Biswas Rout. Immediately thereafter, the appellant started living separately from the respondent since May 1994. The appellant suffered intense physical and mental torture.

According to the appellant, the respondent had withdrawn Rs.9,50,000/- from the Bank Account of the appellant and deposited the same in her account.

The appellant alleged that the respondent got a false first information report registered against him under Sections 420/467/468 and 471 IPC which was registered as Case No.156 of 1995. According to him, the respondent again got a case under Sections 323/324 I.P.C. registered in the police station Panki, Kanpur City and efforts were made to get the appellant arrested.

The appellant filed a Civil Suit No. 1158/1996 against the respondent. It was also reported that the appellant was manhandled at the behest of the respondent and an FIR No.156 of 1996 was filed by the eldest son at the behest of the respondent against the appellant in police station, Panki complaining that the appellant had physically beaten her son, Nitin Kohli.

The respondent in her statement before the Trial Court had mentioned that she had filed an FIR against the appellant under Section 420/468 IPC at the Police Station, Kotwali and the respondent had gone to the extent of filing a caveat in the High Court in respect of the said criminal case so that the appellant may not obtain an order from the High Court against her filing the said FIR.

In the same statement, the respondent had admitted that she had filed an FIR No.100/96 at the Police Station, Kohna under Section 379/323 IPC against the appellant.

The respondent had also filed a complaint against the appellant and his mother under Sections 498A/323/504/506 IPC at Police Station, Kohna.

The respondent in her statement had admitted that she had opposed the bail of the appellant in the criminal case filed at the Police Station, Kotwali on the basis of legal advice. In that very statement she further admitted that after the police had filed final report in both the criminal cases relating to Police Station, Kotwali and Police Station, Kohna, she had filed protest petition in those cases.

This clearly demonstrates the respondent's deep and intense feeling of revenge. The respondent in her statement had also admitted that she had filed a complaint in the Women Cell, Delhi in September 1997. According to the appellant, the respondent had filed a complaint no.125 of 1998 against the appellant's lawyer and friend alleging criminal intimidation which was found to be false.

According to the appellant, the respondent filed a forged complaint under sections 397/398 of the Companies Act before the Company Law Board, New Delhi and in the affidavit of the respondent she stated that the appellant was immoral, alcoholic, and was having affairs with numerous girls since marriage. She also called him a criminal, infidel, forger and her manager to denigrate his position from the proprietor to an employee of her company.

The appellant also mentioned that the respondent filed a false complaint in Case No.1365 0f 1988 using all kinds of abuses against the appellant.

On 8.7.1999, the respondent filed a complaint in the Parliament Street Police Station, New Delhi and made all efforts to ensure the appellant's arrest with the object of sending him to jail. The appellant was called to the police station repeatedly and was interrogated by the police and only after he gave a written reply and the matter on scrutiny was found to be false, the appellant with great difficulty was able to save himself from imprisonment.

On 31.3.1999 the respondent had sent notice for breaking the Nucleus of the HUF, expressly stating that the Family Nucleus had been broken with immediate effect and asking for partition of all the properties and assets of the HUF and stating that her share should be given to her within 15 days. According to the appellant, this act of the respondent clearly broke all relations between the appellant and the respondent on 31.3.1999.

The respondent had filed a complaint against the appellant under Section 24 of the Hindu Marriage Act directing payment of maintenance during the pendency of the case. This was rejected by the Trial Court and she later filed an appeal in the High Court.

The appellant had deposited Rs.5 lacs on Court's directions but that amount was not withdrawn by the respondent. On 22.1.2001 the respondent gave an affidavit before the High Court and got non-bailable warrants issued against the appellant. Consequently, the appellant was harassed by the police and ultimately he got the arrest order stayed by the High Court. The respondent admitted in her statement that she got the advertisement published in the English National Newspaper 'Pioneer'. The advertisement reads as under :

PUBLIC NOTICE Be it known to all that Mr. Naveen Kohli S/o Mr. Prem Kumar Kohli was working with my Proprietorship firm as Manager. He has abandoned his job since May 1996 and has not resumed duties.

He is no more in the employment of the firm. Any Body dealing with him shall be doing so at his own risk, his authority to represent the firm has been revoked and none should deliver him orders, cash cheques or drafts payable to the firm.

NEELU KOHLI Sole Proprietor M/s NITIN RUBBERS 152-B, Udyog Nagar, Kanpur The respondent in her statement before the Court did not deny the contents of the affidavit but merely mentioned that she did not remember whether she called the appellant a criminal, infidel and a forger in the affidavit filed before the Company Law Board.

The respondent did not deny her using choicest abuses against the appellant but merely stated that she did not remember.

The respondent also filed a contempt petition in the Company Law Board against its order of the Company Law Board dated 25.9.2000 in order to try and get the appellant thrown out of the little apartment and urged that the appellant be sent to jail.

Before the Family Court, the respondent stated about solemnization of the marriage with the appellant on 20.11.1975. In her written statement she had denied the fact that she was either a rude or a quarrelsome lady. The respondent also denied that she had mentally, physically and financially harassed and tortured the appellant. She also stated that she never refused cohabitation with the appellant. She also denied indulging in any immoral conduct. She averred in the written statement that the appellant has been immorally living with a lady named 'Shivanagi'.

The appellant and the respondent filed a number of documents in support of their respective cases. On the basis of the pleadings and the documents, the Additional Principal Judge of Family Court framed the following issues :-

"1. Whether the respondent treated the plaintiff with cruelty by registering various criminal cases, getting the news published and initiating civil proceedings?

2. Whether the defendant treated the plaintiff with cruelty by her objectionable behaviour as stated in the plaint?

3. Whether respondent has made false allegation against the plaintiff? If yes, its impact?

   Whether in the presence of plaintiff, the defendant displayed her behaviour with Dr. Viswas Rout which comes in the category of immorality as has been stated in para 11 of the plaint? If yes, its impact?

4. Whether the petition is not maintainable on the basis of preliminary objections 1 to 3 of the written statement?

5. Whether plaintiff has kept Smt. Shivanagi with him as his concubine? If yes, its impact?

6. Whether suit of the plaintiff is barred by the provisions of Section 11, C.P.C.?

7. Whether plaintiff is entitled to get the decree of dissolution of marriage against defendant?

8. Whether plaintiff is entitled to get any other relief?"

Issues number 1 & 2 relate to the term 'Cruelty' and Issue no. 3 is regarding impact of false allegations levelled by the respondent against the appellant. All these three issues were decided in favour of the appellant and against the respondent. The learned Trial Court came to a definite conclusion that the respondent had filed a very large number of cases against the appellant and got him harassed and tortured by the police. It also declared him an employee of the factory of which the respondent is a proprietor by getting an advertisement issued in the newspaper. According to findings of the Trial Court, the appellant was mentally, physically and financially harassed and tortured by the respondent.

The Trial Court framed specific issue whether the appellant had kept Smt. Shivangi with him as his concubine. This allegation has been denied by the appellant. The respondent had failed to produce any witness in respect of the aforesaid allegation and was consequently not able to prove the same. The Trial Court stated that both parties have levelled allegations of character assassination against each other but failed to prove them.

The Trial Court stated that many a times efforts have been made for an amicable settlement, but on the basis of allegations which have been levelled by both the parties against each other, there is no cordiality left between the parties and there is no possibility of their living together. According to the Trial court, there was no possibility to reconnect the chain of marital life between the parties. Hence, the Trial Court found that there is no alternative but to dissolve the marriage between the parties.

The Trial Court also stated that the respondent had not filed any application for allowing permanent maintenance and Stridhan but, in the interest of justice, the Trial Court directed the appellant to deposit Rs.5,00,000/- toward permanent maintenance of the respondent. The Trial Court also ordered that a decree of dissolution of marriage shall be effective after depositing the payment of Rs.5,00,000/- by the appellant. Admittedly, the appellant had immediately deposited the said amount.

The respondent, aggrieved by the judgment of the Principal Judge, Family Court, Kanpur City, preferred the first appeal before the High Court, which was disposed of by a Division Bench of the Allahabad High Court.

According to the High Court, the Trial Court had not properly appreciated and evaluated the evidence on record. According to the High Court, the appellant had been living with one Shivangi. As per the High Court, the fact that on Trial Court's directions the appellant deposited the sum of Rs.5,00,000/- within two days after the judgment which demonstrated that the appellant was financially well off. The Division Bench of the High Court held that actions of the appellant amounted to misconduct, un-condonable for the purpose of Section 13(1)(a) of the Hindu Marriage Act. The appeal was allowed and the Trial Court judgment has been set aside. The suit filed by the appellant seeking a decree of divorce was also dismissed.

The appellant preferred a Special Leave Petition before this Court. We have carefully perused the pleadings and documents on record and heard the learned counsel appearing for the parties at length.

Both the parties have levelled allegations against each other for not maintaining the sanctity of marriage and involvement with another person. According to the respondent, the appellant is separately living with another woman, 'Shivanagi'. According to the appellant, the respondent was seen indulging in an indecent manner and was found in compromising position with one Biswas Rout. According to the findings of the Trial Court both the parties failed to prove the allegations against each other. The High Court has of course reached the conclusion that the appellant was living with one 'Shivanagi' for a considerable number of years. The fact of the matter is that both the parties have been living separately for more than 10 years. Number of cases including criminal complaints have been filed by the respondent against the appellant and every effort has been made to harass and torture him and even to put the appellant behind the bars by the respondent. The appellant has also filed cases against the respondent.

We would like to examine the facts of the case in the light of the settled position of law which has been crystallized by a series of judgments.

In the light of facts and circumstances of this case we would also like to examine the concept of Irretrievable Breakdown of Marriage particularly with reference to recently decided cases.

Impact of Physical and Mental Cruelty in Matrimonial Matters.

The petition for divorce was filed primarily on the ground of cruelty. It may be pertinent to note that, prior to the 1976 amendment in the Hindu Marriage Act, 1955 cruelty was not a ground for claiming divorce under the Hindu Marriage Act. It was only a ground for claiming judicial separation under Section 10 of the Act. By 1976 Amendment, the Cruelty was made ground for divorce. The words which have been incorporated are "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party". Therefore, it is not necessary for a party claiming divorce to prove that the cruelty treatment is of such a nature as to cause

an apprehension reasonable apprehension that it will be harmful or injurious for him or her to live with the other party.

The Court had an occasion to examine the 1976 amendment in the case of N.G. Dastane v. S. Dastane [(1975) 2 SCC 326: AIR 1975 SC 1534], The Court noted that "....whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent".

We deem it appropriate to examine the concept of 'Cruelty' both in English and Indian Law, in order to evaluate whether the appellant's petition based on the ground of cruelty deserves to be allowed or not.

D. Tolstoy in his celebrate book "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Edition, p. 61) defined cruelty in these words: "Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."

The concept of cruelty in matrimonial matters was aptly discussed in the English case in Bertram v. Bertram [(1944) 59, 60] per Scott, L.J. observed: "Very slight fresh evidence is needed to show a resumption of the cruelty, for cruelty of character is bound to show itself in conduct and behaviour. Day in and day out, night in and night out."

In Cooper vs. Cooper [(1950) WN 200 (HL)], it was observed as under:

"It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival."

Lord Denning, L.J. in Kaslefsky v. Kaslefsky [(1950) 2 All ER 398, 403] observed as under:

"If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament.

This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperiled."

"In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth [(1966) 1 All ER 524, 536], the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case like any civil case, may be proved by a preponderance of probability".

The High Court of Australia in Wright v. Wright [(1948) 77 CLR 191, 210], has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation."

Lord Pearce observed:

"It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all

the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it.

* * * I agree with Lord Merriman whose practice in cases of mental cruelty was always to make up his mind first whether there was injury or apprehended injury to health. In the light of that vital fact the court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently weighty to say that from a reasonable person's point of view, after a consideration of any excuse which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called on to endure it.

* * * The particular circumstances of the home, the temperaments and emotions of both the parties and their status and their way of life, their past relationship and almost every circumstance that attends the act or conduct complained of may all be relevant."

Lord Reid in Gollins v. Gollins [1964 AC 644 : (1963) 2 All ER 966]:

"No one has ever attempted to give a comprehensive definition of cruelty and I do not intend to try to do so.

Much must depend on the knowledge and intention of the respondent, on the nature of his (or her) conduct, and on the character and physical or mental weaknesses of the spouses, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probable injury to life, limb or health.

The principles of law which have been crystallized by a series of judgments of this Court are recapitulated as under :-

In the case of Sirajmohmedkhan Janmohamadkhan vs. Harizunnisa Yasinkhan reported in (1981) 4 SCC 250, this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

In the case of Sbhoba Rani vs. Madhukar Reddi reported in (1988) 1 SCC 105, this Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be

regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merits.

The Court went on to observe as under : "It will be necessary to bear in mind that there has been marked changed in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them.

There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents.

Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (CA) 'the categories of cruelty are not closed'. Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."

In the case of V. Bhagat vs. D. Bhagat reported in (1994) 1 SCC 337, this Court had occasion to examine the concept of 'mental cruelty'. This Court observed as under:

"16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be decided in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

The word 'cruelty' has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case. There may be instances of cruelty by unintentional but inexcusable conduct of any party. The cruel treatment may also result from the cultural conflict between the parties. Mental cruelty can be caused by a party when the other spouse levels an allegation that the petitioner is a

mental patient, or that he requires expert psychological treatment to restore his mental health, that he is suffering from paranoid disorder and mental hallucinations, and to crown it all, to allege that he and all the members of his family are a bunch of lunatics. The allegation that members of the petitioner's family are lunatics and that a streak of insanity runs though his entire family is also an act of mental cruelty. This Court in the case ofSavitri Pandey vs. Prem Chandra Pandey reported in (2002) 2 SCC 73, stated that mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

In this case, this Court further stated as under: "9. Following the decision in Bipinchandra case [AIR 1957 SC 176] this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena [AIR 1964 SC 40] by holding that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation."

In this case, this Court further stated that cruelty can be said to be an act committed with the intention to cause suffering to the opposite party. This Court in the case of Gananth Pattnaik vs. State of Orissa reported in (2002) 2 SCC 619 observed as under:

"The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."

This Court, in the case of Parveen Mehta vs. Inderjit Mehta reported in (2002) 5 SCC 706, defined cruelty as under:

"Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of

mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty.

The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subject to mental cruelty due to conduct of the other."

In this case the Court also stated that so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably.

In Chetan Dass vs. Kamla Devi reported in (2001) 4 SCC 250 , this Court observed that the matrimonial matters have to be basically decided on its facts. In the words of the Court:

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well.

The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society.

The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

In Sandhya Rani vs. Kalyanram Narayanan reported in (1994) Supp. 2 SCC 588, this Court reiterated and took the view that since the parties are living separately for the last more than three years, we have no doubt in our mind that the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. Therefore, the Court granted the decree of divorce.

In the case of Chandrakala Menon vs. Vipin Menon reported in (1993) 2 SCC 6, the parties had been living separately for so many years. This Court came to the conclusion that there is no scope of settlement between them because, according to the observation of this Court, the marriage has irretrievably broken down and there is no chance of their coming together. This Court granted decree of divorce.

In the case of Kanchan Devi vs. Promod Kumar Mittal reported in (1996) 8 SCC 90, the parties were living separately for more than 10 years and the Court came to the conclusion that the marriage between the parties had to be irretrievably broken down and there was no possibility of reconciliation and therefore the Court directed that the marriage between the parties stands dissolved by a decree of divorce.

In Swati Verma vs. Rajan Verma reported in (2004) 1 SCC 123, a large number of criminal cases had been filed by the petitioner against the respondent. This Court observed that the marriage between the parties had broken down irretrievably with a view to restore good relationship and to put a quietus to all litigations between the parties and not to leave any room for future litigation, so that they may live peacefully hereafter, and on the request of the parties, in exercise of the power vested in this Court under Article 142 of the Constitution of India, the Court allowed the application for divorce

by mutual consent filed before it under Section 13-B of the Hindu Marriage Act and declared the marriage dissolved and granted decree of divorce by mutual consent.

In Prakash Chand Sharma vs. Vimlesh [1995 Supp (4) SCC 642], the wife expressed her will to go and live with the husband notwithstanding the presence of the other woman but the husband was not in a position to agree presumably because he has changed his position by remarriage. Be that as it may, a reconciliation was not possible.

In V. Bhagat v. D. Bhagat (supra), this Court while allowing the marriage to dissolve on ground of mental cruelty and in view of the irretrievable breakdown of marriage and the peculiar circumstances of the case, held that the allegations of adultery against the wife were not proved thereby vindicating her honour and character. This Court while exploring the other alternative observed that the divorce petition has been pending for more than 8 years and a good part of the lives of both the parties has been consumed in this litigation and yet, the end is not in sight and that the allegations made against each other in the petition and the counter by the parties will go to show that living together is out of question and rapprochement is not in the realm of possibility. This Court also observed in the concluding part of the judgment that:

"Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extra- ordinary features to warrant grant of divorce on the basis of pleading (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself.

But while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluable mess, when the Court finds it in the interest of both parties."

Again in A. Jaychandra v. Aneel Kumar, (2005) 2 SCC 22, a 3 judge Bench of this Court observed that the expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents

that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

The expression 'cruelty' has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted (See Sobha Rani v. Madhukar Reddi (1988) 1 SCC 105). To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty

in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper- sensitive approach would be counter-productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court.

In Durga P.Tripathy v. Arundhati Tripathy, (2005) 7 SCC 353, this Court further observed that Marriages are made in heaven. Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce.

In Lalitha v. Manickswamy, I (2001) DMC 679 SC that the had cautioned in that case that unusual step of granting the divorce was being taken only to clear up the insoluble mess when the Court finds it in the interests of both the parties.

Irretrievable Breakdown of Marriage Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. Because of the change of circumstances and for covering a large number of cases where the marriages are virtually dead and unless this concept is pressed into services, the divorce cannot be granted. Ultimately, it is for the Legislature whether to include irretrievable breakdown of marriage as a ground of divorce or not but in our considered opinion the Legislature must consider irretrievable breakdown of marriage as a ground for grant of divorce under the Hindu Marriage Act, 1955. The 71st Report of the Law Commission of India briefly dealt with the concept of Irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. We deem it appropriate to recapitulate the recommendation extensively. In this Report, it is mentioned that during last 20 years or so, and now it would around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, namely, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory.

In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a petition to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case in New Zealand reported in 1921. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these word:

"The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this court, as prima facie a good ground for divorce.

When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of

such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous."

In the Report it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet there has arisen a situation in which the marriage cannot be worked. The marriage has all the external appearances of marriage, but none of the reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a fagade, when the emotional and other bounds which are of the essence of marriage have disappeared.

It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfillment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

On May 22, 1969, the General Assembly of the Church of Scotland accepted the Report of their Moral and Social Welfare Board, which suggested the substitution of breakdown in place of matrimonial offences. It would be of interest to quote what they said in their basis proposals:

"Matrimonial offences are often the outcome rather than the cause of the deteriorating marriage. An accusatorial principle of divorce tends to encourage matrimonial offences, increase bitterness and widen the rift that is already there. Separation for a continuous period of at least two years consequent upon a decision of at least one of the parties not to live with the other should act as the sole evidence of marriage breakdown."

Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented concrete instances of human behaviour as bring the institution of marriage into disrepute.

We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems then are sought to be solved.

The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, then it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

The High Court ought to have considered the repercussions, consequences, impact and ramifications of all the criminal and other proceedings initiated by the parties against each other in proper perspective. For illustration, the High Court has mentioned that so far as the publication of the news item is concerned, the status of husband in a registered company was only that of an employee and if any news item is published, in such a situation, it could not, by any stretch of imagination be taken to have lowered the prestige of the husband. In the next para 69 of the judgment that in one of the news item what has been indicated was that in the company, Nikhil Rubber (P) Ltd., the appellant was only a Director along with Mrs. Neelu Kohli whom held 94.5% share of Rs.100/- each in the company. The news item further indicated that Naveen Kohli was acting against the spirit of the Article of the Association of Nikhil Rubber (P) Ltd., had caused immense loss of business and goodwill. He has stealthily removed produce of the company, besides diverted orders of foreign buyers to his proprietorship firm M/s Navneet Elastomers. He had opened bank account with forged signatures of Mrs. Neelu Kohli and fabricated resolution of the Board of Directors of the company. Statutory authority-Companies Act had refused to register documents filed by Mr. Naveen Kolhi and had issued show cause notice. All business associates were cautioned to avoid dealing with him alone. Neither the company nor Mrs. Neelu Kohli shall be liable for the acts of Mr. Naveen Kohli. Despite the aforementioned finding that the news item was intended to caution business associates to avoid dealing with the appellant then to come to this finding in the next para that it will by no stretch of imagination result in mental cruelty is wholly untenable.

The findings of the High Court that the respondent wife's cautioning the entire world not to deal with the appellant (her husband) would not lead to mental cruelty is also wholly unsustainable.

The High Court ought to have examined the facts of the case and its impact. In the instant case, the following cases were filed by the respondent against the appellant.

1. The respondent filed FIR No. 100/96 at Police Station, Kohna under Sections 379/323 IPC

2. The respondent got a case registered under Sections 323/324 registered in the police station Panki, Kanpur City.

3. At the behest of the respondent FIR No.156 of 1996 was also filed in the police station, Panki.

4. The respondent filed FIR under Section 420/468 IPC at the Police Station, Kotwali.

5. The respondent got a case registered under Section under Sections 420/467/468 and 471 IPC.

6. The respondent filed a complaint against the appellant under Sections 498A/323/504/506 IPC at Police Station, Kohna.

7. The respondent had even gone to the extent of opposing the bail application of the appellant in criminal case filed at the police station, Kotwali

8. When police filed final report in two criminal cases at police station, Kotwali and police station, Kohna, the respondent filed protest petition in these cases.

9. The respondent filed complaint no.125 of 1998 in the Women Cell, Delhi in September 1997 against the appellant's lawyer and friend alleging criminal intimidation.

10. The respondent filed a complaint under sections 397/398 before the Company Law Board, New Delhi.

11. The respondent filed a complaint in Case No.1365 0f 1988 against the appellant.

12. Again on 8.7.1999, the respondent filed a complaint in the Parliament Street Police Station, New Delhi and made all efforts to get the appellant arrested.

13. On 31.3.1999, the respondent have sent a notice for breaking the Nucleus of the HUF.

14. The respondent filed a complaint against the appellant under Section 24 of the Hindu Marriage Act.

15. The respondent had withdrawn Rs.9,50,000/- from the bank account of the appellant in a clandestine manner.

16. On 22.1.01 the respondent gave affidavit before the High Court and got non-bailable warrants issued against the appellant.

17. The respondent got an advertisement issued in a national newspaper that the appellant was only her employee. She got another news item issued cautioning the business associates to avoid dealing with the appellant.

The findings of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage is wholly unsustainable.

Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.

The High Court ought to have appreciated that there is no acceptable way in which the parties can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

The High Court ought to have visualized that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.

The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

In our considered view, looking to the peculiar facts of the case, the High Court was not justified in setting aside the order of the Trial Court. In our opinion, wisdom lies in accepting the pragmatic reality of life and take a decision which would ultimately be conducive in the interest of both the parties.

Consequently, we set aside the impugned judgment of the High Court and direct that the marriage between the parties should be dissolved according to the provisions of the Hindu Marriage Act, 1955. In the extra-ordinary facts and circumstances of the case, to resolve the problem in the interest of all concerned, while dissolving the marriage between the parties, we direct the appellant to pay Rs.25,00,000/- (Rupees Twenty five lacs) to the respondent towards permanent maintenance to be paid within eight weeks. This amount would include Rs.5,00,000/- (Rupees five lacs with interest) deposited by the appellant on the direction of the Trial Court. The respondent would be at liberty to withdraw this amount with interest. Therefore, now the appellant would pay only Rs.20,00,000/- (Rupees Twenty lacs) to the respondent within the stipulated period. In case the appellant fails to pay the amount as indicated above within the stipulated period, the direction given by us would be of no avail and the appeal shall stand dismissed. In awarding permanent maintenance we have taken into consideration the financial standing of the appellant.

Before we part with this case, on the consideration of the totality of facts, this Court would like to recommend the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act, 1955 to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce. A copy of this judgment be sent to the Secretary, Ministry of Law & Justice, Department of Legal Affairs, Government of India for taking appropriate steps.

The appeal is accordingly disposed of. In the facts and circumstances of the case we direct the parties to bear their own costs.

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DURGA PRASANNA TRIPATHY VS ARUNDHATI

Appeal (Civil) 5184 of 2005
Date of Judgment: 23/08/2005

(2005) 7 SCC 353

Durga Prasanna Tripathy
Vs.
Arundhati Tripathy

(Before Hon'ble Mrs. Justice Ruma Pal & Hon'ble Mr. Justice A.R. Lakshmanan, JJ.)

This appeal is directed against the judgment dated 23.12.2003 passed by the High Court of Orissa at Cuttack in Civil Appeal No. 10 of 2001 whereby the High Court allowing the appeal filed by the respondent-herein/wife under Section 13(1) of the Hindu Marriage Act, 1955 on the ground of cruelty and desertion

This is a most unfortunate case where both the parties could not carry on their marital ties beyond a period of 7 months of their marriage. The marriage between the parties took place on 05.03.1991 and it is the specific case of the appellant that the respondent deserted him on 22.10.1999 and never again returned to her matrimonial home. Today the position is that the parties have been living separately for almost 14 years which means that there is an irretrievable breakdown of marriage and that because of such breakdown of marriage the marriage between the parties has been rendered a complete deadwood. Learned counsel for the appellant argued that no useful purpose will be served by keeping such a marriage alive on paper, which would only aggravate the agony of the parties. Therefore, he would pray that in the fitness of things and in the interest of justice, the marriage between the parties is forthwith terminated by a decree of divorce. We have perused the orders passed by the Family Court and also of the High Court. Both the Family Court as well as the High Court made efforts to bring about a reconciliation/rapprochement between the parties. The Family Court in this regard gave a clear finding that in spite of good deal of endeavour to effect a reconciliation the same could not be effected because of the insistence of the respondent to remain separately from her in-laws. It was totally an impracticable solution.

In our view that 14 years have elapsed since the appellant and the respondent have been separated and there is no possibility of the appellant and the respondent resuming the normal marital life even though the respondent is willing to join her husband. There has been an irretrievable breakdown of marriage between the appellant the respondent.

Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce. The Family Court has directed the appellant to pay a sum of Rs. 50,000/- towards permanent alimony to the respondent and pursuant to such direction the appellant had deposited the amount by way of bank draft. Considering the status of parties and the economic condition of the appellant who is facing criminal prosecution and out of job and also considering the status of the wife who

is employed, we feel that a further sum of Rs. 1 lakh by way of permanent alimony would meet the ends of justice. This shall be paid by the appellant within 3 months from today by an account payee demand draft drawn in favour of the respondent Arundhati Tripathy and the dissolution shall come into effect when the demand draft is drawn and furnished to the respondent.

JUDGMENT

(Arising out of S.L.P. (Civil) No. 9794 OF 2004)

Dr. AR. Lakshmanan, J.

Leave granted.

This appeal is directed against the judgment dated 23.12.2003 passed by the High Court of Orissa at Cuttack in Civil Appeal No. 10 of 2001 whereby the High Court allowing the appeal filed by the respondent-herein/wife under Section 13(1) of the Hindu Marriage Act, 1955 on the ground of cruelty and desertion.

The marriage between the appellant and the respondent was solemnized on 05.03.1991. After the marriage, the parties led their conjugal life in the village to which the appellant belongs and the respondent-wife persuaded the appellant to stay at Bhubaneswar, the place of her service as well as her parental place. The husband did not approve such proposal as a result of which dispute arose between the parties. It was alleged that the respondent-wife behaved with her husband and her in-laws in a cruel manner. She deserted the appellant by staying in the house of her father since 22.10.1991. The appellant and his parents tried their best to bring the respondent-wife to the marital home but all their efforts were in vain. Thereafter, on 26.05.1996, for the marriage ceremony of the appellant's younger brother, the mother of the appellant also went to bring the respondent but the latter was not inclined to come but misbehaved and insulted her mother-in-law. The appellant's father expired and for which also the father of the respondent was requested by the appellant to send the respondent to the house of the appellant since being the eldest daughter-in-law but then also the respondent did not come. Even after the death of the appellant's father, the respondent in spite of several requests by the appellant and his family members did not join the company of the appellant. The respondent, furthermore, joined the Office of the Civil Supplies at Puri and in view of this, the respondent and her father always insisted the appellant to shift to Bhubaneswar. The appellant, in view of this, after about 7 years from the date of separation took redress of the Court. After leaving the appellant, the respondent also joined as a Junior Assistant in the office of the Civil Supply Corporation.

The respondent-wife denied the allegations made against her. She further stated in her written statement that due to maltreatment of the appellant's mother and brother she came back to her parents house. She also stated that she was willing to live separately from her mother-in-law and brother-in-law. She, therefore, prayed for dismissal of the proceedings.

Both parties led oral evidence in support of their respective cases. The appellant was examined as P.W.1. During his evidence he corroborated the facts made in the original application for divorce. He has also stated that he is not willing to stay with the respondent as husband and wife after a long lapse of about 9 years and there is no chance of reunion between the parties. The respondent examined herself as O.P.W1. She also filed bunch of documents. On the basis of the pleadings and evidence of the parties, the Courts below framed an issue whether there is just and sufficient cause to pass a decree of divorce against the respondent-wife on the grounds of cruelty and desertion or not.

The Family Court, Cuttack passed its judgment and allowed the petition filed by the appellant-herein under Section 13 of the Hindu Marriage Act and thereby granted decree of divorce. The Family Court, after having heard the parties and after perusing the evidence on record, held as follows:-

"When the wife-respondent declines to come to the marital home, undoubtedly it gave mental shock to the petitioner-husband, which knew no bounds. There is also no chance of reunion or reconciliation between the parties. The only course open to the Court is to pass a decree of divorce thereby to put an end to the litigation. The husband-petitioner has proved to the satisfaction of the Court that the wife-respondent is not only cruel, but also deserted him since more than seven years, which are good grounds for passing a decree of divorce."

"However, as regards the alimony the learned Judge directed the petitioner-husband to pay Rs.50,000/- to the wife-respondent towards her permanent alimony, which was to be paid/deposited in the shape of bank draft."

Aggrieved by the judgment of the Family Court, the respondent filed a civil appeal before the High Court of Orissa under Section 19 of the Family Courts Act, 1984.

The appellant contended before the High Court that while allowing the proceedings under Section 13(1) of the Hindu Marriage Act on the ground of cruelty and desertion, the Family Court dissolved the marriage solemnized between the parties on 05.03.1991 and has directed the appellant to pay a sum of Rs.50,000/- towards permanent alimony to the respondent and pursuant to such direction, the appellant has deposited the amount by way of a bank draft.

The High Court, vide its judgment dated 23.12.2003, set aside the decree of divorce passed by the Family Court and allowed the appeal filed by the respondent herein holding that the appellant had failed to prove cruelty and desertion as against the respondent.

Aggrieved against the judgment of the High Court, the appellant preferred the above Special Leave Petition.

We heard Mr. Ranjan Mukherjee, learned counsel appearing for the appellant and Ms. S.S. Panicker, learned counsel appearing for the respondent.

Mr. Ranjan Mukherjee, learned counsel for the appellant, submitted that the High Court has failed to appreciate that the failure of the respondent to substantiate the alleged reasons for staying away and omission to demonstrate readiness and willingness to discharge continuing obligation to return to matrimonial home taken together were sufficient to establish animus deserendi, necessary to prove legal desertion by the wife as per the principles laid down by this Court in a number of cases. He would further submit that the appellant has proved the desertion of the respondent- wife to the satisfaction of the Courts below and after considering all the aspects and evidence led in support of the desertion, the Family Court, after satisfying itself that a reunion between the parties is not possible, has passed a decree of divorce and in pursuance to the direction of the Family Court, the appellant had deposited a sum of Rs.50,000/- by way of a bank draft in favour of the respondent herein. It was further submitted that the High Court has failed to appreciate that in the present case both have been staying separately for about the last 14 years and in the meantime, the respondent has got a job at Bhubaneswar and moreover the appellant and his family members had on quite a number of times tried to get the respondent to her matrimonial home but of no avail. It was further submitted that the High Court has failed to appreciate that the allegations of dowry demand as made by the respondent by the mother-in-law and the brother-in-law are concocted afterthoughts of the respondent to defend her inexplicable

stand which is evident from the fact that though the respondent had left her matrimonial home in the year 1991 itself she had only chosen to lodge a complaint against her mother-in-law and brother-in-law before the Mahila Commission only in the year 1988 i.e. after about 7 years.

Mr. Ranjan Mukherjee further submitted that the parties have been living separately for almost 14 years which means that there is an irretrievable breakdown of marriage and that because of such breakdown of marriage, the marriage between the parties has been rendered a complete deadwood. Mr. Ranjan Mukherjee, in support of his submissions, cited the following judgments of this Court.

1. Anjana Kishore vs. Puneet Kishore, (2002) 10 SCC 194 (Three-Judge Bench)
2. Swati Verma (Smt) vs. Rajan Verma and Others (2004) 1 SCC 123
3. Sanat Kumar Agarwal vs. Nandini Agarwal, (1990) 1 SCC 475
4. Adhyatma Bhattar Alwar vs. Adhyatma Bhattar Sri Devi, (2002) 1 SCC 308
5. G.V.N. Kameswara Rao vs. G. Jabilli, (2002) 2 SCC 296

Ms. S.S. Panicker, learned counsel for the respondent submitted that the plea and evidence of the appellant before the Family Court was at variance and that in absence of corroboration the allegation of the appellant as to the desertion or cruelty by the respondent-wife could not be proved by the appellant. It was submitted that the High Court has rightly arrived at the conclusion that the order of the Family Court was erroneous as the same was passed by misquoting the evidence of the respondent. She would further submit that there is no error in the impugned order of the High Court much less an error requiring interference by this Court under Article 136 of the Constitution of India. It was submitted that the order of the Family Court is prima facie illegal, erroneous and that the Family Court failed to take into account the evidence adduced by the parties in its proper perspective. According to learned counsel for the respondent, a perusal of the evidence would make it amply clear that the appellant in his evidence has clearly admitted that he had himself led the respondent on 23.10.1991 in her father's house which was contrary to the statement in the divorce petition wherein he had made a specific allegation that the respondent had left the matrimonial home on her own accord. He had not written any letter nor taken any relations to persuade the respondent to lead marital life with him and that he was also not willing to stay with the respondent and to continue the marital relations. Learned counsel for the respondent invited our attention to the evidence led in by both the parties and misquoting of the evidence by the Court. The respondent, on the contrary, in her evidence had stated that after 23.10.1991 she had been to the matrimonial home with her father and other relations but the appellant refused to accept her, so she had to take shelter at her parental home, that the appellant was on visiting terms to her parental home that she had led conjugal life with the appellant till February, 1996, that even in the year 1997, the respondent had stayed with the appellant at Jajpur in a rented accommodation but was again forced to quit because of harassment by the in-laws that she was also willing to stay with the appellant at Jaipur and was interested in continuing their marital relations. Learned counsel submitted that the Family Court has failed to take note that the wife had categorically stated before the Conciliation Officer as also in the evidence and pleadings before the Family Court that she was interested and willing to live with the husband and that the appellant on the other hand had clearly stated that he did not want to continue the marital relations. Learned counsel further argued that the appellant has also not been able to prove the allegations of cruelty against the respondent and that the appellant had only alleged that the conduct of the respondent of not returning to the matrimonial home, her lack of cooperation in establishing normal cohabitation, her repeatedly

causing social embarrassment to the appellant by not performing the last rites of the father-in-law and not participating in a marriage ceremony of the appellant's brother and filing false complaint against the mother-in-law and brother-in-law had caused mental depression, anguish and frustration to the appellant amounts to mental cruelty. She would also further submit that the allegations which are necessary to constitute desertion are not present in the instant case. It was also submitted that the appellant filed divorce petition in the year 1998 that is almost 7 years after the alleged desertion by the wife from 23.10.1991 and that the appellant has not given any valid explanation for the unexplained delay in filing the divorce petition. Concluding her arguments, she submitted that the appellant was not entitled to a decree of divorce on the ground of desertion and he and his family members were themselves responsible for the respondent quitting the matrimonial home and, therefore, the appellant cannot be permitted to take advantage of his own wrong for obtaining a decree for divorce in violation of the provisions of theHindu Marriage Act. She submitted that the High Court was, therefore, correct in setting right an apparent error on the face of the order of the Family Court as the order of the Family Court was passed without taking into the evidence of the respondent and the appellant.

We have carefully gone through the pleadings, the evidence led and the judgments cited by learned counsel for the appellant. Learned counsel for the respondent has not cited any ruling in support of her contentions.

This is a most unfortunate case where both the parties could not carry on their marital ties beyond a period of 7 months of their marriage. The marriage between the parties took place on 05.03.1991 and it is the specific case of the appellant that the respondent deserted him on 22.10.1999 and never again returned to her matrimonial home. Today the position is that the parties have been living separately for almost 14 years which means that there is an irretrievable breakdown of marriage and that because of such breakdown of marriage the marriage between the parties has been rendered a complete deadwood. Learned counsel for the appellant argued that no useful purpose will be served by keeping such a marriage alive on paper, which would only aggravate the agony of the parties. Therefore, he would pray that in the fitness of things and in the interest of justice, the marriage between the parties is forthwith terminated by a decree of divorce. We have perused the orders passed by the Family Court and also of the High Court. Both the Family Court as well as the High Court made efforts to bring about a reconciliation/rapprochement between the parties. The Family Court in this regard gave a clear finding that in spite of good deal of endeavour to effect a reconciliation the same could not be effected because of the insistence of the respondent to remain separately from her in-laws. It was totally an impracticable solution.

In this context, we may usefully refer to page 35 of the paper book which reads as follows:

"Be that as it may, good deal of endeavour was made by the Conciliation Cell attached to the Court as per Section 9 of the Family Courts Act and as well as by this Court for a compromise between the parties, but the respondent-wife insisted and wanted to remain separately from her in- laws which was totally impracticable on the part of the petitioner-husband."

This apart, since October, 1991 till date the respondent has not taken any steps from her side to go back to her matrimonial home. The said fact gets reflected from her own deposition before the Family Court wherein she has deposed as under:- "On 23.10.1991, the petitioner left me in the house of my father. I went to the marital home with my father and other relations, but the petitioner created trouble and did not accept me as his wife. So I came away to my father and has taken shelter there."

"The petitioner left me in my father's house after the marriage on 23.10.1991. It is not a fact that I came away suo moto from the marital home deserting the petitioner. Again I came and stayed in the marital home from December, 1991 till February 1992 and thereafter came to my father's house."

The Family Court has given cogent and convincing reasons for passing the decree of divorce in favour of the appellant. Having been convinced that there was no chance of reunion or reconciliation between the parties, more so because of the complaint filed by the respondent before the Mahila Commission, the Family Court with a view to put a quietus to the litigation inter se and the bitterness between the parties rightly passed the decree of divorce.

The Division Bench of the High Court by the impugned judgment has reversed the finding of the Family Court. The learned Judges of the High Court held against the appellant on two points, namely:-

(a) Misquoting of the evidence of the respondent, by the Family Court; and

(b) Inconsistent plea of the appellant with regard to leaving the matrimonial home by the respondent.

Both the aforesaid points taken into consideration by the learned Judges of the High Court cannot, in our view, be construed as a finding upon the merits of the case.

In our view that 14 years have elapsed since the appellant and the respondent have been separated and there is no possibility of the appellant and the respondent resuming the normal marital life even though the respondent is willing to join her husband. There has been an irretrievable breakdown of marriage between the appellant the respondent. The respondent has also preferred to keep silent about her absence during the death of her father-in-law and during the marriage ceremony of her brother-in-law. The complaint before the Mahila Commission does not implicate the appellant for dowry harassment though the respondent in her evidence before the Family Court has alleged dowry harassment by the appellant. It is pertinent to mention here that a complaint before the Mahila Commission was lodged after 7 years of the marriage alleging torture for dowry by the mother-in-law and brother-in-law during the initial years of marriage. The said complaint was filed in 1998 that is only after notice was issued by the Family Court on 27.03.1997 on the application filed by the appellant under Section 13 of the Hindu Marriage Act. The Family Court, on examination of the evidence on record, and having observed the demeanor of the witnesses concluded that the appellant had proved that the respondent is not only cruel but also deserted him since more than 7 years. The desertion as on date is more than 14 years and, therefore, in our view there has been an irretrievable breakdown of marriage between the appellant and the respondent. Even the Conciliation Officer before the Family Court gave its report that the respondent was willing to live with the appellant on the condition that they lived separately from his family. The respondent in her evidence had not disputed the fact that attempts have been made by the appellant and his family to bring her back to the matrimonial home for leading a conjugal life with the appellant. Apart from that, relationship between the appellant and the respondent have become strained over the years due to the desertion of the appellant by the respondent for several years. Under the circumstances, the appellant had proved before the Family Court both the factum of separation as well as animus deserendi which are the essential elements of desertion. The evidence adduced by the respondent before the Family Court belies her stand taken by her before the Family Court. Enough instances of cruelty meted out by the respondent to the appellant were cited before the Family Court and the Family Court being convinced granted the decree of divorce. The harassment by the in-laws of the respondent was an after-thought since the same was alleged after a gap of 7 years of marriage and desertion by the respondent. The appellant having failed in his efforts to get back the respondent to her matrimonial home and having faced the trauma of performing the last rites of his deceased father without the respondent and having

faced the ill-treatment meted out by the respondent to him and his family had, in our opinion, no other efficacious remedy but to approach the Family Court for decree of divorce.

In the following two cases, this Court has taken a consistent view that where it is found that the marriage between the parties has irretrievably broken down and has been rendered a dead wood, exigency of the situation demands, the dissolution of such a marriage by a decree of divorce to put an end to the agony and bitterness:

(a) Anjana Kishore vs. Puneet Kishore (2002) 10 SCC 194

(b) Swati Verma (Smt.) vs. Rajan Verma & Ors. (2004) 1 SCC 123

Likewise, in the following three cases, this Court has observed that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and expression of intention, both anterior and subsequent to the actual act of separation.

(a) Sanat Kumar Agarwal vs. Nandini Agarwal (1990) 1 SCC 475

(b) Adhyatma Bhattar Alwar vs. Adhyatma Bhattar Sri Devi (2002) 1 SCC 308

(c) G.V.N. Kameswara Rao vs. G. Jabilli (2002) 2 SCC 296

The submission made by Mr. Ranjan Mukherjee that the marriage between the appellant and the respondent has for all practical purposes become dead, that there can be no chance of being retrieved and that it was better to bring the marriage to an end merits acceptance and force.

In Chanderkala Trivedi (Smt) vs Dr. S.P. Trivedi, (1993) 4 SCC 232, which is an appeal before this Court against the grant of decree for divorce by the Bombay High Court on the ground of cruelty. When leave was granted, this Court observed that they are granting leave because it appears to them that the marriage between the parties was in all practical purposes dead and the enforced continuity of the marriage will only mean that the parties will spend more years in bitterness against each other. Since the husband was in a position to provide reasonable maintenance or permanent alimony, this Court granted special leave. At the time of final hearing, this Court deleted the findings and has, however, decided not to interfere with the order passed by a Division Bench of the Bombay High Court. The husband, on the persuasion of this Court, agreed to provide a one bed-room flat to the wife in a locality where it can be available between Rs. 3 and 4 lacs. Therefore, while dismissing the appeal, this Court directed the husband to purchase a flat for the wife and further deposit a sum of Rs. 2 lacs by means of a demand draft in the name of the appellant with the Family Court. In V. Bhagat vs. D. Bhagat (Mrs), (1994) 1 SCC 337 = AIR 1994 SC 710, this Court while allowing the marriage to dissolve on ground of mental cruelty and in view of the irretrievable breakdown of marriage and the peculiar circumstances of the case, held that the allegations of adultery against the wife were not proved thereby vindicating her honour and character. This Court while exploring the other alternative observed that the divorce petition has been pending for more than 8 years and a good part of the lives of both the parties has been consumed in this litigation and yet, the end is not in sight and that the allegations made against each other in the petition and the counter by the parties will go to show that living together is out of question and rapproachment is not in the realm of possibility. This Court at page 720 of AIR has observed thus:

"Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of

the divorce proceedings by itself a ground. There must be really some extra- ordinary features to warrant grant of divorce on the basis of pleading (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluable mess, when the Court finds it in the interest of both parties."

The decision reported in Romesh Chander vs. Savitri AIR 1995 SC 851 = 1995 AIR SCW 647 is yet another case where this Court in its powers under Article 142 of the Constitution directed the dissolution of the marriage subject to the transfer of the house of the husband in the name of the wife. In that case, the parties had not enjoyed the company of each other as husband and wife for 25 years, this is the second round of litigation which routing through the trial court and the High Court has reached the Supreme Court. The appeal was based on cruelty. Both the Courts below have found that the allegation was not proved and consequently it could not be made the basis for claiming divorce. However, this Court after following the earlier decisions and in exercise of its power under Article 142 of the Constitution directed the marriage between the appellant and the respondent shall stand dissolved subject to the appellant transferring the house in the name of his wife within four months from the date of the order and the dissolution shall come into effect when the house is transferred and possession is handed over to the wife.

The facts and circumstances in the above three cases disclose that reunion is impossible. Our case on hand is one such. It is not in dispute that the appellant and the respondent are living away for the last 14 years. It is also true that a good part of the lives of both the parties has been consumed in this litigation. As observed by this Court, the end is not in sight. The assertion of the wife through her learned counsel at the time of hearing appears to be impractical. It is also a matter of record that dislike for each other was burning hot.

Before parting with this case, we think it necessary to say the following: Marriages are made in heaven. Both parties have crossed the point of no return. A workable solution is certainly not possible. Parties cannot at this stage reconcile themselves and live together forgetting their past as a bad dream. We, therefore, have no other option except to allow the appeal and set aside the judgment of the High Court and affirming the order of the Family Court granting decree for divorce. The Family Court has directed the appellant to pay a sum of Rs. 50,000/- towards permanent alimony to the respondent and pursuant to such direction the appellant had deposited the amount by way of bank draft. Considering the status of parties and the economic condition of the appellant who is facing criminal prosecution and out of job and also considering the status of the wife who is employed, we feel that a further sum of Rs. 1 lakh by way of permanent alimony would meet the ends of justice. This shall be paid by the appellant within 3 months from today by an account payee demand draft drawn in favour of the respondent Arundhati Tripathy and the dissolution shall come into effect when the demand draft is drawn and furnished to the respondent. In the result, the Civil Appeal is allowed. There will be no order as to costs.

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VINITA SAXENA VS PANKAJ PANDIT

Appeal (Civil) 1687 of 2006
Date of Judgment: 21/03/2006

(2006) 3 SCC 778

Vinita Saxena
Vs.
Pankaj Pandit

(Before Hon'ble Mrs. Justice Ruma Pal & Hon'ble Mr. Justice A.R. Lakshmanan, JJ.)

As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

In Re : Cruelty It was submitted that in order to make out a ground for divorce under Section 13(1)(i-a) of the Act, the conduct complained of should be grave and weighty so as to come to the conclusion that the appellant spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". For this proposition, he relied on the judgment of this Court in A. Jayachandra vs. Aneel Kaur (supra). Para 13 of the aforementioned judgment is as under:

"But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it"

LEGAL PROPOSITION ON THE ASPECT OF CRUELTY It is settled by catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the Section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

The word 'cruelty' has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or

physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by standard of modern civilization in the background of the cultural heritage and traditions of our society, a young and well educated woman like the appellant herein is not expected to endure the harassment in domestic life whether mental, physical, intentional or unintentional. Her sentiments have to be respected, her ambition and aspiration taken into account in making adjustment and her basic needs provided, though grievances arising from temperamental disharmony. This view was taken by the Kerala High Court in the case reported in AIR 1991 Kerala 1.

In 1993 (2) Hindu L.R. 637, the Court had gone to the further extent of observing as follows:

"Sometime even a gesture, the angry look, a sugar coated joke, an ironic overlook may be more cruel than actual beating"

Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all question of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complains accusations or taunts. It may be mental such as indifference and frigidity towards wife, denial of a company to her, hatred and abhorrence for wife or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

JUDGMENT

(Arising out of S.L.P.(C) No.26418 of 2004)

Dr. AR. Lakshmanan, J.

Leave granted.

The above appeal was filed by the appellant, wife of the respondent herein, against the judgment and final order dated 10.9.2004 passed by the High Court of Delhi in F.A.O. No. 235 of 2002 whereby the Civil Writ Petition filed by the appellant was dismissed.

The short facts are as follows:

The marriage between the appellant-Vinita Saxena and the respondent-Pankaj Pandit was soleminzed on 7.2.1993 as per Hindu rites and customs. No child was born out of wedlock. The marriage, according to the appellant, lasted for five months and was never consummated on account of the fact that the respondent was incapable of performing his matrimonial obligations. According to the appellant, from the first day of the marriage, the respondent's mother treated the appellant with utmost cruelty both mental and physical and that the reason for cruelty was the respondent's mental disorder. The respondent's case is a case of Paranoid Schizophrenia and the appellant discovered only after the marriage that the respondent was under constant treatment and observations of different doctors even prior to the marriage for the said ailment. Though the appellant knew the respondent prior to her marriage, in fact, it is only after the marriage, the appellant realised and discovered the mental disorder of the respondent. The appellant was never told by the respondent nor his parents that he was suffering from such serious mental disorder and that he was under the treatment and used to take strong medicines before the marriage. According to Dr. C.R. Samanta, who was a consultant psychiatrist at Aashlok Hospital, the respondent was a case of Schizophrenia and depression. On 4.7.1993, the appellant tried to discuss regarding the problems she was facing with the respondent and her mother-in-law, who objected strongly and accused the appellant of defaming the respondent. At her instance, the appellant was beaten mercilessly by the respondent, which made him nervous to the extent that he consumed "Baygon Spray" to commit suicide. The appellant and her brother immediately took the respondent to the hospital in order to save the respondent's life. Again, Dr. C.R. Samantha prescribed certain medicines i.e. (1) Triperidol (2) Pacitane (3) Prodep to the respondent. The respondent was hospitalised for four days at Aashlok Hospital, Safdarjung Enclave and was discharged after giving proper treatment on 7.7.1993. According to the appellant, Triperidol is given in case of acute and chronic psychoses anxiety disorders, mania, Schizophrenia as per the medical advise. The situation further became worse on 8.7.1993 and 9.7.1993. Again on the instigation of the respondent's mother, the respondent slapped and abused the appellant mercilessly and she was not even allowed to have food that day and the next day morning i.e. on 9.7.1993. On 9.7.1993, the appellant was pushed and kicked out of the matrimonial home by her mother-in-law and the respondent and thereafter, the appellant was not permitted to return again.

The appellant filed H.M.A. Petition on 30.6.1994 against the respondent for dissolution of marriage under Section 13(1)(1-a) and (iii) of the Hindu Marriage Act,1955 hereinafter referred to as "the Act" on the grounds of mental and physical cruelty and insanity before the Court of District Judge at Delhi. The trial Court vide its order dated 15.5.1993, relying on the facts and averments made by the parties as well as taking the medical documents placed on record observed that a letter of request should be written to the Medical Superintendent, L.N.J.P. Hospital to constitute a panel of doctors to examine the respondent and to report about his mental state. However, this order was subsequently set aside by the High Court in a Revision Petition filed by the respondent. After the marriage had broken down the appellant pursued further studies and completed M.S. (Structural Engineering) from IIT Delhi and in 1996, left for her Ph.D. programme to U.S.A. Father of the appellant, J.S. Saxena, deposed as PW-II and the appellant as PW-I and Dr. D.S. Arora, Medical Superintendent, Aashlok Hospital and Dr Kuldeep

Kumar of Safdarjung Hospital recorded their statement as PW-III and PW-IV respectively supporting the case of the appellant. The respondent, however, got only his statement recorded and before his cross-examination could be concluded, deliberately did not appear in the witness box to complete his deposition. The trial Court, vide order dated 19.3.2001, dismissed the petition filed by the appellant under Section 13(1)(1-a) and (iii) of the Act for the grant of decree of divorce. Being aggrieved by the said order, the appellant filed an appeal before the High Court. The High Court vide order dated 10.9.2004 dismissed the appeal filed by the appellant holding that the respondent is not suffering from Schizophrenia and that there is insufficient material on record to establish the cause of cruelty and further held that the incidents of cruelty is not so grave which come within the scope of concept of cruelty. The High Court also held that the testimonies of the doctors examined by the appellant to prove that the respondent was suffering from Schizophrenia cannot be looked into for the reason that the respondent was not under the treatment of the above doctors. Aggrieved by the said order, the appellant filed this appeal by way of special leave petition before this Court. The respondent filed a counter affidavit. It is stated in the counter affidavit that the special leave petition is devoid of any merit inasmuch as the Courts below have given findings of fact in favour of the respondent and the Courts below have rejected the pleas of the appellant on the ground that she has not made out any case for grant of divorce. It was submitted that the appellant even before the marriage was having intimacy with the respondent from 1986 to 1993 and she did not find any abnormality in the behaviour of the respondent. It was also submitted that the appellant has not made out any case seeking divorce on the ground of causing cruelty to her inasmuch as she has failed to prove any instance leading to causing such cruelty to her by the respondent. It was submitted that the respondent is willing to take the appellant and keep her happy to the fullest and it is the desire of the respondent that the marriage should not break on the ground that she is building up her career in America for the past 12 years. Since concurrent findings of fact is in favour of the respondent, the appellant ought not to be stated that the respondent and his mother were involved in causing cruelty to her and that the Courts below have also disbelieved the version of the appellant that the cruelty was caused by the respondent due to his mental disorder. It was further contended that the appellant did not lead any evidence to prove as a matter of fact that the respondent was suffering from Schizophrenia and that the appellant has filed the petition deliberately and wilfully and with a view to harass the respondent and his mother. It was also contended that the mere branding of spouse as Schizophrenic is not sufficient and that the degree of mental disorder of the spouse must be proved to be such that the appellant spouse cannot be reasonably be expected to live with the other. It was also submitted that from the evidence and pleadings, it has clearly been stated that the appellant was having sex with the respondent without any problem and there is no truth in the allegation made by the appellant. The other allegations mentioned in the Divorce Petition have not been proved at all and that the appeal filed by the appellant deserves to be rejected. We heard Ms. Kamini Jaiswal, learned counsel appearing for the appellant-wife and Mr. Dhruv Mehta, learned counsel appearing for the respondent-husband. We have perused the pleadings, annexures filed along with the appeal and the orders passed by the courts below and the grounds of appeal. Learned counsel for the appellant while reiterating the averments made in the appeal submitted the following grounds for granting divorce as prayed for by the appellant-wife :

1) Non-consummation of the marriage itself would constitute mental cruelty to a married woman.

2) The respondent attempted to commit suicide also amounts to mental cruelty and harassment.

3) The appellant has lived only for five months after the marriage and she was mercilessly beaten by the respondent and his mother.

4) There was absolutely nothing to show that the documents and prescription given by the doctors have been concocted. They are the official records of the Hospital.

5) The medical prescriptions and the evidence of doctors clearly illustrate that the respondent was under the treatment of Dr. Samantha and was a case of Paranoid Schizophrenia.

6) The respondent, before his cross examination could be concluded, deliberately did not appear in the witness box to complete his deposition and his evidence had to be closed.

7) The appellant was denied the matrimonial bliss of physical relation by the respondent because of his incompetency which itself constitute cruelty for a married woman.

8) The threat to commit suicide by the respondent amounts to cruelty and the Courts below took cognizance of the fact that the respondent consumed "Baygon spray".

9) Because Dr. Samantha was not alive, the medical record authored by him can only be proved by secondary evidence though Dr. D.S. Arora, medical Superintendent who certified on oath that the respondent was admitted in Aashlok Hospital and stated that he had brought the records in respect of Pankaj Pandit. He also identified the signatures of Dr. Samantha and the medical prescriptions of his having treated the respondent have also been produced and proved by him where it had been categorically stated that the respondent is suffering from Paranoid Schizophrenia.

10) Likewise on the ground of non-availability of Dr. Abhyankar, who had authored the medical prescription as he was no more in service of the hospital cannot be fatal to disregard the evidence of the other doctor, who produced and proved the entire record.

11) The marriage between the appellant and the respondent hardly lasted for five months and both of them are living separately for the last 13 years. Learned counsel appearing for the appellant cited the following decisions:

    1) Shrikant Anandrao Bhosale vs. State of Maharashtra, (2002) 7 SCC 748,

    2) A. Jayachandra vs. Aneel Kaur, (2005) 2 SCC 22,

    3) Smt. Uma Wanti vs. Arjan Dev , AIR 1995 P&H 312

    4) Harbhajan Singh Monga vs. Amarjeet Kaur AIR 1986 MP 41

    5) Mrs. Rita Nijhawan vs. Shri Balkishan Nijhawan, AIR 1973 Delhi

    6) Yuvraj Digvijay Singh vs. Yuvrani Pratap Kumari, AIR 1970 SC 137.

    7) Vijay Kumar Ramchandra Bhate vs. Neela vijaykumar Bhate, AIR 2003 SC 2462

    8) B.N. Panduranga Shet vs. N. Vijaylaxmi, AIR 2003 Karnataka 357

Mr. Dhruv Mehta, learned counsel appearing for the respondent, per contra, after referring to the grounds of divorce and the findings recorded by the trial Court and the High Court which has affirmed the findings of the trial Court, submitted that in order to make out a ground for divorce under Section 13(1)(iii) of the Act, it is not necessary to establish that the respondent is suffering continuously or intermittently from mental disorder but it must further be established that it is of such a kind and to such an extent that the appellant cannot be reasonably be expected to live with the respondent. In other words, the burden is not discharged by merely establishing that the respondent is suffering from mental disorder which in the present case would include Schizophrenia by virtue of the Explanation

to the said provision but the appellant must further lead evidence to establish that the mental disorder is of such a kind and to such an extent that the appellant cannot reasonably be expected to live with the respondent.

According to learned counsel for the respondent, the above contention finds support from a decision of this Court in Ram Narain Gupta vs. Smt. Rameshwari Gupta, 1988(4) SCC 247. For ready reference, the relevant paras from the said judgment are as under:

"20. The context in which the ideas of unsoundness of 'mind' and 'mental disorder' occur in the section as grounds for dissolution of a marriage, require the assessment of the degree of the 'mental disorder'. Its degree must be such that the spouse seeking relief cannot reasonably be expected to live with the other. All mental abnormalities are not recognised as grounds for grant of decree. If the mere existence of any degree of mental abnormality could justify dissolution of a marriage few marriages would, indeed, survive in law. xx xx xx

28. The reasoning of the High Court is that the requisite degree of the mental disorder which alone would justify dissolution of the marriage has not been established. This, it seems to us, to be not an unreasonable assessment of the situation - strong arguments of Shri Goel to the contrary notwithstanding.

xx xx xx

30. ..the burden of proof of the existence of the requisite degree of mental disorder is on the spouse basing the claim on that state of facts.

33. This medical concern against too readily reducing a human being into a functional non entity and as a negative unit in family or society is law's concern also and is reflected, at least partially, in the requirements of Section 13(1)(iii). In the last analysis, the mere branding of a person as schizophrenic will not suffice. For purposes of Section 13(1)(iii) 'schizophrenia' is what schizophrenia does."

It was further submitted that the aforesaid judgment of this Court has been followed by the Karnataka High Court in the case of B.N. Panduranga Shet vs. N. Vijayalaxmi, (supra). Learned counsel also relied on the decision of the Calcutta High Court in the case of Rita Roy vs. Sitesh Chandra AIR 1982 Calcutta 138 and the decision of the Himachal Pradesh High Court reported in (1995) DMC 71 (DB). Learned counsel also cited the judgment of this Court in Rakesh K. Gupta vs. Ram Gopal Agarwala & Ors., AIR 2005 SC 2426 for the proposition that even in a custody dispute between the husband and wife wherein it was alleged by the husband that the wife is suffering from Paranoid Schizophrenia, this Court still awarded custody of the child to the mother.

According to the learned counsel, the evidence which has been brought on record by the appellant is wholly insufficient to infer that the respondent was suffering from the said mental disorder and the doctors who are alleged to have treated the respondent have not been examined as witnesses by the appellant and what has been brought on record are certain prescriptions made by the said doctors and the same are sought to be proved by examining the Medical Superintendent of Aashlok Hospital, Safdarjung Enclave. Therefore, he submitted that in view of the above fact, no inference can be drawn that the respondent was suffering from Paranoid Schizophrenia and that the appellant has not been discharged of the burden as required by the statutory provision. Learned counsel contended that the words used in sub-clause (iii) of Section 13(1) to the effect that "mental disorder of such a kind and to such an extent that the appellant cannot reasonably be expected to live with the respondent" must be given full effect as it is a well accepted principle of statutory interpretation that a Court must make

every effort to give effect to all words in a statute since Parliament cannot be held to have been wasting its words or saying something in vain. Learned counsel, for this proposition, relied on the following two decisions of this Court:

(a) Shin Etsu Chemical Company Ltd. Vs. Aksh Optifibre Ltd., (2005) 7 SCC 234.

(b) Union of India vs. Popular Construction , (2001) 8 SCC 470 Concluding his submissions, learned counsel submitted that the appellant having failed to establish the aforementioned requirement of the statute, the appeal must fail on this ground.

In Re : Cruelty It was submitted that in order to make out a ground for divorce under Section 13(1)(i-a) of the Act, the conduct complained of should be grave and weighty so as to come to the conclusion that the appellant spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". For this proposition, he relied on the judgment of this Court in A. Jayachandra vs. Aneel Kaur (supra). Para 13 of the aforementioned judgment is as under:

"13. ..but before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it"

It was argued that the trial Court, after examining the evidence, has come to the conclusion that the acts complained of are not such as would constitute cruelty and in any event the ground for divorce under Section 13(1)(i-a) is not made out. It was submitted that the trial Court had occasioned to see the demeanour of witnesses and, therefore, the view taken by the trial Court unless it can be said to be perverse should not be faulted with. It was also contended that the approach in such cases should be to perverse the matrimonial home. The judgment in the case of Savitri Pandey vs. Prem Chandra Pandey, (2002) 2 SCC 73 was relied on for this purpose. Answering the contention raised by the counsel for the appellant that the parties have not lived together for a long time and therefore, this is a fit case to pass a decree of divorce, learned counsel for the respondent, submitted that this is a wholly untenable argument and has to be rejected by this Court. For this, he relied on the ruling of this Court in the case of A. Jayachandra vs. Aneel Kaur (supra). Concluding his arguments, learned counsel appearing for the respondent submitted that both the trial Court and the High Court have recorded concurrent findings and have rejected the prayer of the appellant to grant decree of divorce under Section 13(1)(i-a) and (iii) of the Act and, therefore, this Court under Article 136 of the Constitution of India cannot interfere with the said findings unless it is established that the findings recorded by the trial Court and the High Court are perverse. Arguing further, he submitted that the findings of the trial Court are based on the consideration of the entire evidence and well reasoned and in similar circumstances, this Court refused to interfere with the concurrent findings of fact arrived at by the Courts in Savitri Pandey vs. Prem Chandra Pandey (supra).

We have given our thoughtful and anxious consideration for the rival submissions made by the respective counsel appearing on either side. The appellant filed a petition for divorce underSection 13(1)(i-a) and (iii) of the Act on the ground of mental and physical cruelty. It is also her case that on account of Paranoid Schizophrenia that the respondent was suffering from, the appellant could not be reasonably expected to live with the respondent. Section 13 (1)(i-a) and (iii) are reproduced hereunder:

"13. Divorce - (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or * * * * *

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation - In this clause, -

(a) the expression "mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub- normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

(iv) has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

Explanation - In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. (I-A) Either party to a marriage, whether solemnized before or after the commencement of this Act may also present a petition for the dissolution of the marriage by a decree of divorce on the ground -

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground -

(i) in the case of any marriage solemnized before the commencement of this act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956) , or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation - This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.

It is not in dispute that the marriage has lasted hardly for five months and was never consummated on account of the fact that the respondent was incapable of performing his matrimonial obligations. The appellant has examined herself as PW-1. She has specifically stated in her deposition that the marriage was not consummated at all. It has further come out in her deposition that she accompanied the respondent at AIIMS and met Prof. Dr. Prema Bali, Sexologist and Marriage Counsellor. In her deposition, it had also come out that the Doctor informed her that the respondent cannot perform the marital obligations. She was also informed by the said Doctor that the respondent was a Psychopathic case and he has no power of concentration. She was also informed that the disease is of incurable in nature. The appellant has further deposed that respondent kept on sleeping for three days immediately after solemnization of marriage and the appellant was told that she should not disturb him. It was further stated in her evidence that on 4.7.1993, the appellant was blamed for the respondent's illness and was mercilessly beaten up and on the same day the respondent consumed "Baygon Spray" to commit suicide and he was taken to Aashlok Hospital, Safdarjung Enclave by the appellant and her brother. In her cross-examination, the appellant has stated that though they were studying together in the Engineering College, however, there were no special meetings between them except meeting in the class. It has also come on record that there was no intimacy between the appellant and the respondent. The appellant has emphatically denied the allegation about the intimacy between the appellant and the respondent prior to marriage w.e.f. 1987. She also stated on oath that it was a marriage though of her choice but solemnized only after her parents had given the consent. In the cross- examination, the respondent has not been able to shake or destroy the case of the appellant.

In support of her case, PW-2, J.S. Saxena father of the appellant, was examined. He supported the appellant's case and corroborated her evidence. Even in the cross-examination of PW-2, there is no material change or inconsistency. With regard to the grant of cruelty, there is deposition of the appellant and her father on record which clearly establishes and proves that the appellant was treated with cruelty by the respondent and his mother. With regard to the plea of mental insanity i.e. Section 13(1) (iii), the appellant adduced the evidence of Dr. D.S. Arora, Medical Superintendent, Aashlok Hospital as well as Dr. Kuldeep Kumar of Safdarjung Hospital. Dr. D.S. Arora, a summoned witness produced the entire record pertaining to the respondent. He exhibited the case of the respondent maintained by Dr. C.R. Samantha. Dr. D.S. Arora identified the signatures of Dr. C.R. Samantha and proved Ex. PW-3/1. The original record of respondent was produced in the Court. Dr. D.S. Arora also proved the

prescriptions Ex. PW-3/2 and Ex. PW-3/3. Ex. PW-3/5 was the prescription written by Dr. D.S. Arora and it was bearing his signatures. The entire medical history and record of the respondent pertaining to his medical illness, his visit and admission to Aashlok Hospital on 4.7.1993 and discharge on 7.7.1993 as well as the case history of the respondent maintained by Dr.C.R. Samantha were duly proved and exhibited. According to the medical record, the respondent was admitted with reference to a case of Psychopathic and depression for the last fortnight, now admitted for disturbed consciousness. He was suggested to take Triperidol medicine. The other prescription has been authored by Dr. D.S. Arora who stated that the respondent had consumed "Baygon Spray". It was also specified that the respondent is a known case of depression. Medicine 'Triperidol' was suggested to be administered to him. With regard to the consumption of "Baygon Spray", a stomach wash was carried out upon the respondent and he was administered injections 'Atropine', and 'Dextrose-1/V and PAM 1 to 1/V. The evidence of Dr. D.S. Arora and the record signed by Dr. C.R. Samantha are admissible in evidence and has been legally proved. The evidence of Dr. Kuldeep Kumar of Safdarjung Hospital also establishes the case of mental insanity and the fact that the respondent was a case of Paranoid Schizophrenia. The said Doctor produced the original record and made necessary deposition. He had brought the originals during his examination and it is recorded that the respondent had visited the Psychiatric Ward on 12.12.1992 along with his mother. Dr. Abhyankar also recorded about the history of respondent's illness. It was also recorded by the said Doctor that the respondent suffers from delusion of persecution and reference effect and on the physical examination it had been observed that the respondent has clear systematized delusion of persecution and reference and, therefore on the review it is clear that the respondent is suffering from Paranoid Schizophrenia. The medical record of the respondent maintained by the Safdarjung hospital (Outdoor Patient Department) has been established that the respondent visited Hospital on 21.12.1992 and was advised for psychological testing. It was observed in a medical sheet that the respondent was initially diagnosed for psychosis. However, on subsequent visits and after detailed examination it has been confirmed that he suffers from Paranoid Schizophrenia. The appellant has also produced on record a communication dated 9.5.1994 addressed by Professor Dr. Prema Bali, who was working in the Institute of Sexology and Marriage Counselling. Dr. Prema Bali is the relative of respondent and she has communicated to the appellant that the respondent has a psychiatric problem as his case is a case of Paranoid Schizophrenia.

It would be pertinent to observe that there is no evidence whatsoever adduced by the respondent or on his behalf. In fact, after recording of the examination-in-chief and part cross-examination, the respondent refused to come in the witness box and ran away. The observation has been made by the trial Court in the proceedings. A RESEARCH ON THE DISEASE "Schizophernia is one of the most damaging of all mental disorders. It causes its victims to lose touch with reality. They often begin to hear, see or feel things that aren't really there (hallucinations) or become convinced of things that simply aren't true (delusions). In the paranoid form of this disorder, they develop delusions of persecution or personal grandeur. The first signs of paranoid schizophrenia usually surface between the ages of 15 and 34. There is no cure, but the disorder can be controlled with medications. Severe attacks may require hospitalization.

The appellant has filed Annexures L,M,N,O,P and Q which are extracts about the aforesaid disease. The extracts are sum and substance of the disease and on a careful reading it would be well established that the evidence and documents on record clearly make out a case in favour of appellant and hence appellant was entitled to the relief prayed. In the memorandum and grounds of Appeal, some salient

features of the disease have also been specified. Some of the relevant part of the extracts from various medical publications are reproduced herein below:

What is the disease and what one should know?

* A psychotic lacks insight, has the whole of his personality distorted by illness, and constructs a false environment out of his subjective experiences.

* It is customary to define 'delusion' more or less in the following way. A delusion is a false unshakeable belief, which is out of keeping with the patient's social and cultural background.' German psychiatrists tend to stress the morbid origin of the delusion, and quite rightly so. A delusion is the product of internal morbid processes and this is what makes it unamenable to external influences. * Apophanuous experiences which occur in acute schizophrenia and form the basis of delusions of persecution, but these delusions are also the result of auditory hallucinations, bodily hallucinations and experiences of passivity. Delusions of persecution can take many forms. In delusions of reference, the patient feels that people are talking about him, slandering him or spying on him. It may be difficult to be certain if the patient has delusions of self-reference or if he has self-reference hallucinosis. Ideas of delusions or reference are not confined to schizophrenia, but can occur in depressive illness and psychogenic reactions.

Causes The causes of schizophrenia are still under debate. A chemical imbalance in the brain seems to play a role, but the reason for the imbalance remains unclear. One is a bit more likely to become schizophrenic if he has a family member with the illness. Stress does not cause schizophrenia, but can make the symptoms worse. Risks Without medication and therapy, most paranoid schizophrenics are unable to function in the real world. If they fall victim to severe hallucinations and delusions, they can be a danger to themselves and those around them.

What is schizophrenia?

Schizophrenia is a chronic, disabling mental illness characterized by:

* Psychotic symptoms * Disordered thinking * Emotional blunting How does schizophrenia develop?

Schizophrenia generally develops in late adolescence or early adulthood, most often:

* In the late teens or early twenties in men * In the twenties to early thirties in women What are the symptoms of schizophrenia?

Although schizophrenia is chronic, symptoms may improve at times (periods of remission) and worsen at other times (acute episodes, or period of relapse).

Initial symptoms appear gradually and can include:

* Feeling tense * Difficulty concentrating * Difficulty sleeping * Social withdrawal What are psychotic symptoms?

Psychotic symptoms include:

* Hallucinations: hearing voices or seeing things * Delusions : bizarre beliefs with no basis in reality (for example, delusions of persecution or delusions of grandeur) These symptoms occur during acute or psychotic phases of the illness, but may improve during periods of remission. A patient may experience * A single psychotic episode during the course of the illness * Multiple psychotic episodes over a lifetime * Continuous psychotic episodes During a psychotic episode, the patient is not completely out of touch with reality. Nevertheless, he/she has difficulty distinguishing distorted

perceptions of reality (hallucinations, delusions) from reality, contributing to feelings of fear, anxiety, and confusion. The disorder can prove dangerous for some - especially when symptoms of paranoia combine with the delusional symptoms of schizophrenia. In fact, doctors say paranoid schizophrenics are notorious for discontinuing the treatments which help control their symptoms.

The Indian Drug Review has specified the Drug Trifluoperidol as a sedative and tranquilizer. With regard to administration it has been suggested that it is given to patient suffering from Schizophrenia. Incidentally this drug was being administered on medical advice to the respondent."

In our view, the trial Court failed to appreciate the uncontroverted evidence of the appellant who had proved the case on every count. It has been established beyond doubt by the Medical doctors who had deposed as witnesses and brought the original medical record of the respondent that the respondent is suffering from mental disorder. Further ground for grant of divorce on the plea of mental insanity/ mental disorder is different than cruelty. The appellant, in our view, had proved beyond doubt that the respondent suffered from mental disorder and that the appellant suffered cruelty by and at the behest of the respondent.

Learned single Judge of the High Court failed to appreciate that in the absence of any evidence led by the respondent, the appellant's evidence had to be relied upon and on the basis of the evidence, the decree for divorce was bound to be granted in favour of the appellant. The appellant had also given specific instances of cruelty which clearly establish that she had a reasonable apprehension that it will be harmful or injurious for her to live with the respondent.

LEGAL PROPOSITION ON THE ASPECT OF CRUELTY

It is settled by catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the Section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

The word 'cruelty' has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by standard of modern civilization in the background of the cultural heritage and traditions of our society, a young and well educated woman like the appellant herein is not expected to endure the harassment in domestic life whether mental, physical, intentional or unintentional. Her sentiments have to be respected, her ambition and aspiration taken into account in making adjustment and her basic needs provided, though grievances arising from temperamental disharmony. This view was taken by the Kerala High Court in the case reported in AIR 1991 Kerala 1.

In 1993 (2) Hindu L.R. 637, the Court had gone to the further extent of observing as follows:

"Sometime even a gesture, the angry look, a sugar coated joke, an ironic overlook may be more cruel than actual beating"

Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.

The legal concept of cruelty which is not defined by statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all question of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complains accusations or taunts. It may be mental such as indifference and frigidity towards wife, denial of a company to her, hatred and abhorrence for wife or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

As to what constitute the required mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

The modern view of cruelty of one spouse to another in the eye of law has been summarised as follows in (1977) 42 DRJ 270 Halsbury Laws of England Vol.12, 3rd edition page 270:-

"The general rule in all kinds of cruelty that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations of taunts. Before coming to a conclusion, the judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from the point of view. In determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."

This Court in Dastane vs. Dastane AIR 1975 SC 1575 observed as under:-

"The Court has to deal not with an ideal husband and an ideal wife, (assuming any such exist) but with the particular man and women before it. The ideal couple or a mere ideal one will probably have no occasion to go to a matrimonial court or, even if they may not be able to drawn their differences, their ideal attitudes may help them overlook or gloss over mutual fault and failures.

Marriage without sex The Division Bench in the case of Rita Nijhawan vs. Balkrishan Nijhawan in AIR 1973 Delhi 200 at 209 observed as follows:

"Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favourable influence on a woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifres woman's brain, develops her character and trebles her vitality. It must be recognized that nothing is more fatal to marriage than disappointment in sexual intercourse."Section 13(1)(iii) 'mental disorder' as a ground of divorce is only where it is of such a kind and degree that the appellant cannot reasonably be expected to live with the respondent. Where the parties are young and the mental disorder is of such a type that sexual act and procreation of children is not possible it may furnish a good ground for nullifying the marriage because to beget children from a Hindu wedlock is one of the principal aim of Hindu Marriage where sanskar of marriage is advised for progeny and offspring. This view was taken in AIR 1991 MP 205. This Court in Digvijay Singh vs. Pratap Kumari, AIR 1970 SC 137 has held as follows "A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings."

Lord Denning in Sheldon v. Sheldon (1966) 2 All ER 257, "The categories of cruelty are not disclosed. Each case may be different. We deal with the conduct of human being who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capability to tolerate the conduct complained of. Such is the wonderful realm of cruelty."

Spouses owe rights and duties each to the other and in their relationship they must act reasonably. In every case where cruelty exists it is possible to say that the spouse at fault has been unreasonable. The list of cruelty, therefore, should be breach of the duty to act reasonably, whether in omission or commission, causing injury to health. Such a list avoids imputing on intention where in fact none may exist. Further all such matters are foresight, desires, wishes, intention, motives, perception, obtuseness, persistence and indifference would remain relevant but merely as matter of evidence bearing upon the requirement to act reasonably or as aggravation of the matters charged.

We can also take note of the fact that the respondent had filed a revision against the order of the trial Court's direction for setting up of a medical Board to examine the respondent. At the time of hearing, this Court directed the counsel for the respondent to ascertain from the respondent as to whether he is willing to submit himself for medical examination. However, the respondent refused to submit himself for medical examination and go before the medical Board. This would but confirm the contention of the appellant that the respondent is suffering from Paranoid Schizophrenia and that this

Court can draw adverse inference in view of the conduct of the respondent. In the case of Smt. Uma Rani vs. Arjan Devi (supra), it has been held that unsoundness of mind may be held to be cruelty.

In the case of Harbhajan Singh Monga vs. Amarjeet Kaur (Supra), it has been held that attempt to commit suicide by one spouse has been found to amount to cruelty to other.

The observation made by this Court in the case of Shobha Rani vs. Madhukar Reddi, AIR 1988 SC 121 can be reproduced to appreciate the facts and circumstances of the case on hand. It reads as follows:

"There has been a marked change in the life around us. In matrimonial duties and responsibilities in particular, there is a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. The Judges and lawyers, therefore, should not import their own notions of life. Judges may not go in parallel with them. There may be a generation gap between the Judges and the parties. It would be better if the Judges keep aside their customs and manners. It would be also better if Judges less depend upon precedents."

Humane aspects which this Court should consider:

- The appellant was 24 years of age when she got married. ? The marriage lasted for four to five months only when she was compelled to leave the matrimonial home.
- The marriage between the parties was not consummated as the respondent was not in a position to fulfil the matrimonial obligation. ? The parties have been living separately since 1993. 13 years have passed they have never seen each other.
- Both the parties have crossed the point of no return. ? A workable solution is certainly not possible.
- Parties at this stage cannot reconcile themselves and live together forgetting their past as a bad dream.
- Parties have been fighting the legal battle from the year 1994.
- The situation between the parties would lead to a irrefutable conclusion that the appellant and the respondent can never ever stay as husband and wife and the wife's stay with the respondent is injurious to her health. ? The appellant has done her Ph.d. The respondent, according to the appellant, is not gainfully employed anywhere.
- As a matter of fact, after leaving his deposition incomplete during the trial, the respondent till date has neither appeared before the trial Court nor before the High Court.

The facts and circumstances of the case as well as all aspects pertain to humanity and life would give sufficient cogent reasons for us to allow the appeal and relieve the appellant from shackles and chain of the respondent and let her live her own life, if nothing less but like a human being.

In our view, the orders of the Courts below have resulted in grave miscarriage of justice to the appellant who has been constrained into living with a dead relationship for over 13 years. The resultant agony and injustice that has been caused to the appellant, it is a fit case for interference under Article 136 of the Constitution of India and reversal of findings of the Courts below which have resulted in grave miscarriage of justice. In the result, the civil appeal stands allowed. There will be a decree for divorce

in favour of the appellant-wife and against the respondent-husband. The order of the trial Court as affirmed by the High Court, stands set aside. There will be no order as to costs.

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A. JAYACHANDRA VS ANEEL KAUR

Case No.: Appeal (Civil) 7763-7764 of 2004
(Arising out of S.L.P (C) Nos. 8655-8656 of 2003)
Date of Judgment: 02/12/2004

(2005) 2 SCC 22

A. Jayachandra
Vs.
Aneel Kaur

(Before Hon'ble Mrs. Justice Ruma Pal, Hon'ble Mr. Justice Arijit Pasayat & Hon'ble Mr. Justice C.K. Thakker, JJ.)

Parties to a marriage tying nuptial knot are supposed to bring about the union of souls. It creates a new relationship of love, affection, care and concern between the husband and wife. According to Hindu Vedic philosophy it is sanskar a sacrament; one of the sixteen important sacraments essential to be taken during one's lifetime. There may be physical union as a result of marriage for procreation to perpetuate the lineal progeny for ensuring spiritual salvation and performance of religious rites, but what is essentially contemplated is union of two souls. Marriage is considered to be a junction of three important duties i.e. social, religious and spiritual.

This case presents a very unpleasant tale of two highly educated professionals (doctors by profession) fighting a bitter matrimonial battle.

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct. In the instant case, after filing of the divorce petition a suit for injunction was filed, and the respondent went to the extent of seeking detention of the respondent.

She filed a petition for maintenance which was also dismissed. Several caveat petitions were lodged and as noted above, with wrong address. The respondent in her evidence clearly accepted that she intended to proceed with the execution proceedings, and prayer for arrest till the divorce case was finalized. When the respondent gives priority to her profession over her husband's freedom it points unerringly at disharmony, diffusion and disintegration of marital unity, from which the Court can deduce about irretrievable breaking of marriage.

even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of Shiv Sunder's case (supra). The factual position in each of the other cases is also distinguishable. It was held that long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In Shiv Sunder's case (supra) it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases.

In the aforesaid legal and factual background the inevitable conclusion is that the appellant is entitled to a decree of divorce and we direct accordingly.

JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

Parties to a marriage tying nuptial knot are supposed to bring about the union of souls. It creates a new relationship of love, affection, care and concern between the husband and wife. According to Hindu Vedic philosophy it is sanskar a sacrament; one of the sixteen important sacraments essential to be taken during one's lifetime. There may be physical union as a result of marriage for procreation to perpetuate the lineal progeny for ensuring spiritual salvation and performance of religious rites, but what is essentially contemplated is union of two souls. Marriage is considered to be a junction of three important duties i.e. social, religious and spiritual.

This case presents a very unpleasant tale of two highly educated professionals (doctors by profession) fighting a bitter matrimonial battle.

Background facts sans unnecessary details are as follows:

The appellant (hereinafter referred to as the 'husband') and the respondent (hereinafter referred to as the 'wife') tied nuptial knot on 10.10.1978. They were blessed with two children. Both are majors by now. The marriage was what is commonly known as "love marriage". Appellant and the respondent were co-students in the medical college. They belong to different parts of the country; the appellant-husband is a Telugu Brahmin while the respondent-wife belongs to Sikh religion. They were both working in the hospital which was established by the appellant's father Dr. A. Ram Murthy. Allegedly finding the behaviour of the respondent-wife obnoxious, humiliating and amounting to mental cruelty, a notice was given by the appellant-husband on 5.3.1997 seeking divorce by mutual consent to avoid

unnecessary complications. It was stated therein that they had not shared the bed and there was no physical contact between them for over two years. It was indicted in the notice that the respondent had treated appellant with cruelty and her conduct amounted to desertion for two years and was, therefore, neither safe, desirable nor advisable to continue marital relationship. A response was given by respondent on 21.3.1997 denying the allegations. It was suggested that there should be a free and heart to heart discussion to sort out the problems for a harmonious married life. The aforesaid task which admittedly took place did not bring any result and ultimately a petition under Section 13 of the Hindu Marriage Act, 1955 (in short the 'Act') was filed before Family Courts, Hyderabad. It was categorically stated therein that the behaviour and conduct of the respondent was causing immense emotional stress, mental agony, and there being no sharing of the bed and cohabitation for more than two years, prayer was made to grant decree of divorce for dissolving the marriage between the parties. It was specifically stated that the respondent has ill-treated her husband, abused him in vulgar language in the home and at the hospital and at other places thereby causing mental agony, damage and loss personally and professionally and also in the social circle; allegations were made about his character. Caveats were filed at different places with a view to forestall legal action, and create an impression of innocence. Caveats were admittedly lodged at the wrong address of the appellant. Counter affidavit was filed by the respondent denying the allegations. It was stated that her bona fide acts in advising her husband to act properly and to be decent in his behaviour was misconstrued and was being projected as nagging and insulting behaviour. The petition for divorce was filed on unfounded allegations.

At this juncture it would be relevant to note that after the petition was filed by the appellant-husband, a suit for injunction bearing OA No. 89/97 in respect of right to practise in the hospital was filed by the respondent. The said suit was not objected to by the appellant and the suit was decreed on 20.11.1997. Subsequently, an execution petition was filed praying for attachment of hospital equipments belonging to the appellant, and also for civil detention of the appellant for alleged disobedience of the order of injunction. It was categorically stated by the respondent during trial that she was not willing to withdraw the application until divorce case was finalized. An application for maintenance was also filed before the Family Court, Hyderabad, where the matter was pending claiming a sum of Rs.13,000/- p.m., though admittedly the respondent is a professional doctor. Subsequently, another suit was filed for perpetual and mandatory injunction bearing O.S. No. 43/1999 against the appellant for allowing respondent and the staff appointed by her use of certain portion of the hospital and use of the medical instruments.

Evidence was led by the parties. The respondent stated in her evidence that she had complete faith and trust in her husband and no doubt about his integrity and character. But at the same time, she stated that she had advised him on five counts to be discreet and decent in his behaviour. By judgment dated 18.6.2001 Family Court, Hyderabad, passed decree for judicial separation with effect from the date of the decree. Though the Family Court found that unfounded allegations which caused mental agony were made by the respondent, and her alleged acts clearly caused mental agony and mental cruelty, yet keeping in view the welfare of the children instead of decree for divorce a decree for judicial separation was felt to be more appropriate. Both the appellant and respondent challenged the judgment before the High Court. While the appellant-husband took the stand that a decree for divorce should have been passed, the respondent-wife questioned legality of the decree for judicial separation. By the impugned judgment a Division Bench of the High Court dismissed the husband's appeal while allowing the wife's appeal. It was held that the materials on records were not sufficient to prove any mental cruelty. The entire evidence led by the appellant did not even emit smell of cruelty. It was noted that even if it was

a fact that the respondent was using abusive language and making allegations of adultery with nursing staff, the husband ought to have examined some witnesses from the hospital and since it was not done, cruelty was not established.

Learned counsel for the appellant submitted that the approach of the High Court is clearly erroneous. It did not examine the evidence led in detail and upset the findings recorded by the trial Court after analyzing the evidence in great detail. It was not even pointed out as to how the evidence led by the appellant was in any way deficient to prove cruelty. Mere non-examination of staff of the hospital cannot be a ground to discard the cogent and credible evidence led by the appellant. It was further submitted that mental cruelty was clearly established and in any event the marriage has broken down irretrievably and on that score alone the decree of divorce should have been passed.

Learned counsel for the respondent-wife submitted that no particulars of alleged cruelty were indicated. Making vague allegations about the mis-behaviour was not sufficient for accepting the prayer for divorce. The evidence was scanty and in no way established mental cruelty. What amounts to cruelty has been dealt with by this Court in S. Hanumantha Rao v. S. Ramani[1]. The accepted factual position shows that till 1993 the relationship was smooth except some stray incidents of discord which are normal in any marriage and such normal wear and tear in relationship cannot be a ground for seeking divorce. It was submitted that even if it is accepted, for the sake of argument, that marriage has broken down that cannot be a ground to grant a decree for divorce. Reference was made to the decisions of this Court in Chetan Dass v. Kamla Devi[2], G.V.N. Kameswara Rao v. G. Jabilli[3] andShyam Sunder Kohli v. Sushma Kohli @ Satya Devi[4].

Further submission was that in the case at hand it cannot be said that the requisite ingredients for constituting cruelty have been satisfied.

The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents

1 1999 (3) SCC 620

2 AIR 2001 SC 1709

3 2002 (2) SCC 296

4 JT 2004 (8) SC 166

that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

The expression 'cruelty' has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted (See Sobh Rani v. Madhukar Reddi, AIR 1988 SC 121).

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

The foundation of a sound marriage is tolerance, adjustment and respecting one another. Tolerance to each other's fault to a certain bearable extent has to be inherent in every marriage. Petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven. All quarrels must be weighed from that point of view in determining what constitutes cruelty

in each particular case and as noted above, always keeping in view the physical and mental conditions of the parties, their character and social status. A too technical and hyper-sensitive approach would be counter- productive to the institution of marriage. The Courts do not have to deal with ideal husbands and ideal wives. It has to deal with particular man and woman before it. The ideal couple or a mere ideal one will probably have no occasion to go to Matrimonial Court. (See Dastane v. Dastane, AIR 1975 SC 1534).

On reading of judgments of the trial Court and the High Court one thing is clear. While the trial Court analysed the evidence in great detail and found that the accepted stand of the respondent-wife regarding her behaviour and conduct caused mental agony and amounted to mental cruelty, the High Court did not discuss the evidence at all. On the specious ground that witnesses from the hospital were not examined and, therefore, adverse inference was to be drawn. There was not even any discussion as to how the evidence led was insufficient to establish mental cruelty. The High Court's view that if at all it was a fact that respondent was using abusive language and making allegations of adultery with nursing staff, some witnesses from the hospital were necessary to be examined is clearly indefensible. That alone should not have been made the determinative factor to discard evidence on record. On that ground alone the judgment of the High Court is vulnerable. The evidence as led and which is practically undisputed is that the respondent had asked the husband to do certain things which cannot be termed to be a simple advice for proper behaviour. For example in her evidence respondent clearly accepted that she had said five things to be followed by him. Surprisingly, most of them related to ladies working in the hospital. Though respondent tried to show that they were simple and harmless advice, yet on a bare reading thereof it is clear that there were clear manifestations of her suspecting the husband's fidelity, character and reputation. By way of illustration, it may be indicated that the first so called advice was not to ask certain female staff members to come and work on off-duty hours when nobody else was available in the hospital. Second was not to work behind the closed doors with certain members of the staff. Contrary to what she had stated about having full faith in her husband, the so called advices were nothing but casting doubt on the reputation, character and fidelity of her husband. Constant nagging on those aspects, certainly amounted to causing indelible mental agony and amounts to cruelty. The respondent was not an ordinary woman. She was a doctor in the hospital and knew the importance of the nature of duty and the necessity of members of the staff working even during off hours and the working conditions. There was another instance which was specifically dealt with by the trial Court. Same related to the alleged extra marital relationships of the appellant with another married lady who was wife of his friend. Though the respondent tried to explain that she was not responsible for making any such aspersions, the inevitable conclusion is to the contrary.

The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct. In the instant case, after filing of the divorce petition a suit for injunction was filed, and the respondent went to the extent of seeking detention of the respondent. She filed a petition for maintenance which was also dismissed. Several caveat petitions were lodged and as noted above, with wrong address. The respondent in her evidence clearly accepted that she intended to proceed with the execution proceedings, and prayer for arrest till the divorce case was finalized. When the respondent gives priority to her profession over her husband's freedom it points unerringly at disharmony, diffusion and disintegration of marital unity, from which the Court can deduce about irretrievable breaking of marriage.

Several decisions, as noted above, cited by learned counsel for the respondent to contend even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of Shiv Sunder's case (supra). The factual position in each of the other cases is also distinguishable. It was held that long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In Shiv Sunder's case (supra) it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of the statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases.

In the aforesaid legal and factual background the inevitable conclusion is that the appellant is entitled to a decree of divorce and we direct accordingly.

The appeals are allowed with no order as to costs.

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PARVEEN MEHTA VS INDERJIT MEHTA

Appeal (Civil) 3930 of 2002
Date of Judgment: 11/07/2002

(2002) 5 SCC 296

Parveen Mehta
Vs.
Inderjit Mehta

(Before Hon'ble Mr. Justice D.P. Mohapatra & Hon'ble Mr. Justice Brijesh Kumar, JJ.)

What is the meaning and import of the expression 'cruelty' as a matrimonial offence is the core questionn on the determination of which depends the result and the fate of this case.

We find is that right from the beginning the matrimonial relationship between the parties was not normal; the spouses stayed together at the matrimonial home for a short period of about six months; the respondent had been trying to persuade the appellant and her parents to agree to go for proper medical treatment to improve her health so that the parties may lead a normal sexual life; all such attempts proved futile. The appellant even refused to subject herself to medical test as advised by the doctor. After 21st June, 1987 she stayed away from the matrimonial home and the respondent was deprived of her company. In such circumstances, the respondent who was enjoying normal health was likely to feel a sense of anguish and frustration in being deprived of normal cohabitation that every married person expects to enjoy and also social embarrassment due to the behavior of the appellant. Further, the conduct of the appellant in approaching the police complaining against her husband and his parents and in not accepting the advice of the superior judicial officer Mr.S.K.Jain and taking a false plea in the case that she had conceived but unfortunately there was miscarriage are bound to cause a sense of mental depression in the respondent. The cumulative effect of all these on the mind of the respondent, in our considered view, amounts to mental cruelty caused due to the stubborn attitude and inexplicably unreasonable conduct of the appellant.

JUDGMENT

D.P. MOHAPATRA, J.

Leave granted.

What is the meaning and import of the expression 'cruelty' as a matrimonial offence is the core question on the determination of which depends the result and the fate of this case.

The appellant is the wife of the respondent. They were married according to Hindu rites and customs on 6th December, 1985. The marriage was preceded by negotiation between the two families, ring exchange ceremony, etc. A meeting between the boy and the girl was also arranged at Yamuna Nagar in the State of Haryana. After marriage the spouses stayed together at Panipat where the respondent was posted as a Judicial Officer. They lived together till 28th April, 1986 when they parted company never to stay together again. It is the case of the respondent that right from the first day of the marriage he sensed something abnormal with his wife; he was unable to consummate the marriage as there was

no cooperation from the side of the wife for sexual intercourse. Despite several attempts cohabitation was not possible for lack of cooperation on the part of the wife. It is the further case of the respondent that when he first met his wife when some members of the two families met he had noticed that she was looking very frail and weak. When he wanted to know the reason for such state of her health her father and other relations told him that she had been undergoing a strict diet control and had been making efforts to reduce her w.eight On questioning his wife immediately after the marriage the respondent could ascertain that she was suffering from some ailment and she was under the treatment of Vaid Amar Nath Sastry of Chandigarh. On 10th December, 1985 the respondent took his wife to see Mr.Sastry at Chandigarh who informed him that father of the girl was his close friend and he was already seized of the problems of her health. He gave some medicines to be taken by her. Thereafter they returned to Yamuna Nagar where parents of the respondent were living. Subsequently, the respondent took the appellant to Panipat where he was posted and they started living there and continued with the medicines. In February, 1986 the appellant agreed to be examined by Dr.B.M.Nagpal of Civil Hospital, Panipat. The doctor advised a thorough check up and diagnosis. However, this was not possible since the appellant did not cooperate and ultimately gave out because she was not interested in taking any medical treatment.

The respondent further alleged that the state of health of the appellant continued to deteriorate; she continued to lose weight; she suffered from asthmatic attacks; on account of her ailment her behavior became quarrelsome; and on trifle matters she threatened to leave the matrimonial home. It was further contended that during her stay at Panipat when Surinder Singh Rao and Virender Jain, friends of the respondent visited his place, the appellant refused to prepare tea and started misbehaving with him in presence of the outsiders thereby causing embarrassment to him. Ultimately on 28th April, 1986 her brother and brother's wife came to Panipat and took the appellant with them. It was the further case of the respondent that when the appellant was with her parents several attempts were made by him offering to give her the best possible medical treatment so that the condition of her health may improve and both of them could lead a happy married life. All such attempts failed. The offer of medical treatment was rejected and even nature of the ailment suffered by her was not disclosed to the respondent.

On one occasion when Shri S.K. Jain, a senior officer of the Judicial Service, then the Legal Remembrancer of Haryana and who later became a Judge of the High Court was discussing the matter with the parties with a view to bring about a settlement the appellant caught hold of the shirt collar of the respondent and created an ugly and embarrassing situation. Again on 30th July 1986 the appellant accompanied by a number of persons searched for the respondent in the Court premises at Kaithal and not finding him there forcibly entered his house and threatened him. A report about the incident was sent to the superior officer of the respondent. Alleging the aforestated facts and circumstances the respondent filed the petition in August, 1996 seeking dissolution of the marriage on the grounds of cruelty and desertion.

The appellant refuted the allegations made in the petition. She denied that her husband had been misled regarding the state of her health before their marriage. She alleged that the marriage was duly consummated and the phera ceremony was performed; and that her husband had been expressing full love and affection towards her. She denied that she suffered from any serious ailment and had been treated by Vaid Amar Nath Sastri. It was her case that she had become pregnant from the wedlock but unfortunately there was miscarriage. It was the further case of the appellant that the respondent and his parents wanted to pressurise the appellant and her parents to agree for a divorce by mutual

consent. On 21st June, 1987 when a meeting of relations of both sides took place at the house of her mother's sister Smt.Parakash Kapur at Yamuna Nagar the respondent stated that the appellant was too frail and weak; that she must be suffering from some disease and therefore, he was not prepared to take her back. Thereafter several attempts were made by her parents and other relations to persuade the respondent to take the appellant to his house but such attempts were of no avail on account of want of any response from the respondent and his parents.

On the pleadings of the parties, the Trial Court framed the following issues :

"1) Whether the respondent-wife has deserted the petitioner, if so, its effect? OPP

2) Whether the respondent-wife is guilty of cruelty, if so, its effect?

OPP

3) Whether this petition is barred by latches, in accordance with Section 23(1a) and (d) of the Act?

OPP

4) Relief."

Both the parties led evidence, both oral and documentary, in support of their cases. The Trial Court on assessing the evidence on record, dismissed the petition for divorce filed by the respondent.

The respondent filed an appeal, FAO No.42-M/99 before the High Court assailing the judgment of the Trial Court. The appeal was allowed by the learned Single Judge by the judgment rendered on 1st June, 2000. The learned Single Judge granted the prayer of the respondent for dissolution of the marriage on the ground of cruelty and further held that as the marriage took place about 14 years ago and there was no child out of the wedlock it would be in the interest of justice that the parties should be separated from each other. The operative portion of the judgment is quoted hereunder :

"In view of the discussion as such the only conclusion which can be arrived at is that despite the fact that the respondent is a good lady but has created the aforesaid situation because of her own act and conduct concerning the non-disclosure of her state of health and concealment by her above acted as a mental and physical cruelty to the appellant which entitles him to a decree of divorce. Therefore, the findings of the learned District Judge on issue Nos.1 to 3 are reversed.

For the foregoing reasons, the appeal is allowed, marriage between the parties stands dissolved and a decree of divorce on the grounds of desertion and cruelty is hereby granted in favour of the appellant (husband) and against the respondent (wife). In the circumstances of the case, the parties are left to bear their own costs. However, it would be appropriate to ask the husband not to remarry till 30.9.2000. Hence ordered accordingly."

The wife, who is the appellant herein, filed an appeal before the Division Bench, Letters Patent Appeal No.1000 of 2000, assailing the judgment of the learned Single Judge. The Division Bench of the High Court by the judgment rendered on 8th August, 2000 dismissed the Letters Patent Appeal in limine. The Division Bench held: "Even otherwise, in the facts and circumstances of the case in hand, in our view, it cannot be said that the husband has tried to take advantage of any wrong on his part. Rather, he did make the best possible effort to explore the possibility of detecting the deficiency or disease, if any, and for treatment of poor health of his wife. But, all in vain. We find no merit in the Letters Patent Appeal. It is, therefore, dismissed in limine." The said judgment is under challenge in this appeal.

Shri Ujjagar Singh, learned senior counsel appearing for the appellant contended that in the context of facts and circumstances of the case the High Court has erred in granting the prayer for divorce by the respondent on the sole ground of cruelty. He further contended that even assuming that the spouses did not enjoy normal sexual relationship with each other on account of frail health of the appellant and there were heated exchanges between the parties followed by the appellant catching hold of shirt collar of the husband, that is not sufficient to establish a case of cruelty for the purpose of Section 13(1) (ia) of the Act. Shri Singh also contended that if the ground of cruelty fails then the further ground stated in favour of the decree of divorce that the marriage has irretrievably broken down will be of no avail to the respondent.

Shri Sudhir Chandra, learned senior counsel appearing for the respondent strenuously contended that in the facts and circumstances of the case the High Court rightly recorded the finding of cruelty by the appellant towards the respondent. Elucidating the point Shri Sudhir Chandra submitted that the respondent was kept in the dark about the poor state of health of the appellant at the time of the marriage negotiations despite the query made by him about the reason for her frail and weak health. After marriage when the respondent was prepared to provide the best possible medical treatment to improve her health neither the appellant nor her parents extended their cooperation in the matter. Further, the erratic and impulsive behavior of the wife caused serious embarrassment to the respondent before his friends and colleagues. The cumulative effect of all the aforesaid facts and circumstances of the case, according to Shri Sudhir Chandra, give rise to reasonable apprehension in the mind of the respondent that it is not safe to continue matrimonial relationship with the appellant. Thus a case of cruelty for the purpose of Section 13(1)(ia) was made out. It was the further contention of Shri Sudhir Chandra that the respondent remarried in December, 2000, two years after the judgment of the Single Judge and nearly four months after the judgment of the Division Bench was rendered. In the facts and circumstances of the case, urged Shri Sudhir Chandra, this is not a fit case for this Court to interfere with the judgment and decree passed by the High Court in exercise of its jurisdiction under Article 136 of the Constitution of India.

As noted earlier, the learned Single Judge granted the respondent's prayer for dissolution of the marriage on the ground of 'cruelty'. Therefore, the question arises whether in the facts and circumstances of the case a case for divorce under Section 13(1)(ia) of the Hindu Marriage Act,1955 (for short 'the Act') has been made out. The answer to this question depends on determination of the question formulated earlier. In Section 13(1) it is laid down that :

"Divorce.- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party xxx xxx xxx (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty;"

Under the statutory provision cruelty includes both physical and mental cruelty. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined under the Act. Probably, the Legislature has advisedly refrained from making any attempt at giving a comprehensive definition of the expression that may cover all cases, realising the danger in making such attempt. The accepted legal meaning in England as also in India of this expression, which is rather difficult to define, had been 'conduct of such character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger' (Russel v. Russel [(1897) AC 395 and Mulla Hindu Law, 17th Edition, Volume II page 87]. The provision in clause (ia) of Section 13(1), which was introduced by the Marriage Laws (Amendment) Act 68 of

1976, simply states that 'treated the petitioner with cruelty'. The object, it would seem, was to give a definition exclusive or inclusive, which will amply meet every particular act or conduct and not fail in some circumstances. By the amendment the Legislature must, therefore, be understood to have left to the courts to determine on the facts and circumstances of each case whether the conduct amounts to cruelty. This is just as well since actions of men are so diverse and infinite that it is almost impossible to expect a general definition which could be exhaustive and not fail in some cases. It seems permissible, therefore, to enter a caveat against any judicial attempt in that direction (Mulla Hindu Law, 17th Eidition, Volume II, page 87).

This Court in the case of Dastane vs. Dastane, AIR 1975 SC 1534, examined the matrimonial ground of cruelty as it was stated in the old Section 10(1)(b) and observed that any inquiry covered by that provision had to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious to live with the respondent. It was further observed that it was not necessary, as under the English law that the cruelty must be of such a character as to cause danger to life, limb or health, or as to give rise to a reasonable apprehension of such a danger though, of course, harm or injury to health, reputation, the working character or the like would be an important consideration in determining whether the conduct of the respondent amounts to cruelty or not. In essence what must be taken as fairly settled position is that though the clause does not in terms say so it is abundantly clear that the application of the rule must depend on the circumstances of each case; that 'cruelty' contemplated is conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. The treatment accorded to the petitioner must be such as to cause an apprehension in the mind of the petitioner that cohabitation will be so harmful or injurious that she or he cannot reasonably be expected to live with the respondent having regard to the circumstances of each case, keeping always in view the character and condition of the parties, their status environments and social values, as also the customs and traditions governing them.

In the case of Savitri Pandey vs. Prem Chandra Pandey, (2002) 2 SCC 73, this Court construing the question of 'cruelty' as a ground of divorce under Section 13(1)(ia) of the Act made the following observations :

"Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(i-a) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent.

Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly show that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life."

This Court, construing the question of mentral cruelty under Section 13(1)(ia) of the Act, in the case of G.V.N.Kameswara Rao vs. G.Jabilli, (2002) 2 SCC 296, observed :

"The court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the court should consider whether the conduct of the counter-petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the court can find that there is cruelty on the part of the counter-

petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances."

Quoting with approval the following passage from the judgment in V.Bhagat vs. D.Bhagat, (1994) 1 SCC 337, this Court observed therein:

"Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made".

Clause (ia) of sub-Section (1) of Section 13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus mental cruelty has to be established from the facts (Mulla Hindu Law, 17th Edition, Volume II, page 91).

In the case in hand the foundation of the case of 'cruelty' as a matrimonial offence is based on the allegations made by the husband that right from the day one after marriage the wife was not prepared to cooperate with him in having sexual intercourse on account of which the marriage could not be consummated. When the husband offered to have the wife treated medically she refused. As the

condition of her health deteriorated she became irritating and unreasonable in her behaviour towards the husband. She misbehaved with his friends and relations. She even abused him, scolded him and caught hold of his shirt collar in presence of elderly persons like Shri S.K.Jain. This Court in the case of Dr.N.G.Dastane Vs. Mrs.S.Dastane (supra), observed : "Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment".

Cruelty for the purpose of Section 13(1)(ia) is to be taken as a behavior by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.

Judged in the light of the principles discussed above what we find is that right from the beginning the matrimonial relationship between the parties was not normal; the spouses stayed together at the matrimonial home for a short period of about six months; the respondent had been trying to persuade the appellant and her parents to agree to go for proper medical treatment to improve her health so that the parties may lead a normal sexual life; all such attempts proved futile. The appellant even refused to subject herself to medical test as advised by the doctor. After 21st June, 1987 she stayed away from the matrimonial home and the respondent was deprived of her company. In such circumstances, the respondent who was enjoying normal health was likely to feel a sense of anguish and frustration in being deprived of normal cohabitation that every married person expects to enjoy and also social embarrassment due to the behavior of the appellant. Further, the conduct of the appellant in approaching the police complaining against her husband and his parents and in not accepting the advice of the superior judicial officer Mr.S.K.Jain and taking a false plea in the case that she had conceived but unfortunately there was miscarriage are bound to cause a sense of mental depression in the respondent. The cumulative effect of all these on the mind of the respondent, in our considered view, amounts to mental cruelty caused due to the stubborn attitude and inexplicably unreasonable conduct of the appellant.

The learned Single Judge in his judgment has discussed the evidence in detail and has based his findings on such discussions. In the Letters Patent Appeal the Division Bench on consideration of the facts and circumstances of the case agreed with the findings recorded by the learned Single Judge. In the context of the facts and circumstances on record we are of the view that the learned Single Judge rightly came to the conclusion that the prayer of the respondent for dissolution of the marriage on the ground of cruelty under Section 13(1)(ia) of the Act was acceptable. Therefore, the Division Bench committed no error in upholding the judgment of the learned Single Judge.

As noted earlier the parties were married on 6th December, 1985. They stayed together for a short period till 28th April 1986 when they parted company. Despite several attempts by relatives and well-

wishers no conciliation between them was possible. The petition for the dissolution of the marriage was filed in the year 1996. In the meantime so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably without any fault on the part of the respondent. Further the respondent has re- married in the year 2000. On this ground also the decision of the High Court in favour of the respondent's prayer for dissolution of the marriage should not be disturbed. Accordingly this appeal fails and is dismissed. There will, however, be no order for costs.

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SAVITRI PANDEY VS PREM CHANDRA PANDEY

Case No.: Appeal (Civil) 20-21 of 1999
Date of Judgment : 08/01/2002

(2002) 2 SCC 73

Savitri Pandey
Vs.
Prem Chandra Pandey

(Before Hon'ble Mr. Justice R.P. Sethi & Hon'ble Mr. Justice Y.K. Sabharwal, JJ.)

Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(i-a) of the Act.

Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health.

Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health.

Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party.

Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent

Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons

the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion

the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage.

JUDGMENT

SETHI, J.

Alleging cruelty and desertion against the husband, the appellant- wife approached the Matrimonial Court under Section 13 of the Hindu Marriage Act (hereinafter referred to as "the Act") praying for dissolution of her marriage with the respondent by a decree of divorce. She also prayed for direction to the respondent to return her ornaments given to him at the time of marriage. The Family Judge allowed the petition and dissolved the marriage of the parties on the ground of desertion by the husband. The appellant was also granted a decree of Rs.12,000/- towards the price of the scooter, allegedly given at the time of the marriage and payment of Rs.500/- per month as permanent alimony. Both the husband and the wife preferred appeals against the order of the Family Court as the wife was not satisfied with the part of the order refusing to grant a decree in her favour in respect of properties claimed by her and the husband was aggrieved by the order of dissolution of the marriage by a decree of divorce. Both the appeals were disposed of by the impugned order holding that the appellant-wife herself was a defaulting party and neither the allegations of cruelty nor of desertion were proved. The order passed underSection 27 of the Hindu Marriage Act and for permanent alimony was also set aside. The grievance of the appellant-wife is that the High Court was not justified in setting aside the findings of fact arrived at by the Family Court and that she had proved the existence of cruelty and desertion against the respondent. It is contended that as the appellant-wife was proved to have been living separately, it was to be presumed that the respondent had deserted her.

The facts of the case giving rise to the filing of the present appeals are that marriage between the parties was solemnised on 6.5.1987. The appellant-wife lived with the respondent-husband till 21st June, 1987 and according to her the marriage between the parties was never consummated. After 21st June, 1987 the parties started living separately. The appellant alleged that her parents spent more than Rs.80,000/- with respect to the ceremonies of the marriage and also gave several articles in the form of ornaments, valuables, cash and kind as per demand of the respondent. The respondent and his family members allegedly made further demands of Colour TV, Refrigerator and some other ornaments besides hard cash of Rs.10,000/-. The father of the appellant obliged the respondent by giving him Rs.10,000/- in the first week of June, 1987 but could not fulfil the other demands of his parents. The respondent and his family members were alleged to have started torturing the appellants on false pretexts. Aggrieved by the attitude of the respondent and his family members, the appellant states to have filed a petition under Section 13of the Act seeking dissolution of marriage by a decree of divorce along with prayer for the return of the property and grant of permanent alimony. The respondent also filed a petition seeking divorce and grant of other reliefs. However, on 14.5.1996 the respondent filed an application for withdrawal of his matrimonial case which was allowed on 19.5.1996. The appellant had alleged that the respondent was having illicit relations with a lady residing in Gaya at Bihar with whom he was stated to have solemnised the marriage. The allegations made in the petition were denied by the respondent and it was stated that in fact the appellant-wife was taking advantage of her own wrongs.

On the basis of the pleadings of the parties, the following issues were framed:

"1. Whether the defendant has treated the petitioner with cruelty? If so, its effect?

2. Whether the petitioner is entitled to relief under Sec.27 of the Hindu Marriage Act? If so, its effect?

3. Whether the defendant is entitled to any relief? If so, its effect?

4. To what relief, parties are entitled?"

It may be noticed that no issue with regard to alleged desertion was insisted to be framed. With respect to the issue of cruelty, the Family Court concluded that no evidence had been led to prove the allegations. The Court, however, held: "but it is proved that the respondent had deserted the petitioner, hence the petitioner will get or is entitled to for a decree of divorce". On appreciation of evidence led in the case, the Division Bench of the High Court held: "We also do not find any evidence that the wife has been treated with cruelty by the husband. We are also of the view that there is no evidence that petitioner is deserted."

We have heard the learned counsel for the parties and perused the record.

Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly shows that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life.

No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof. Learned counsel for the appellant submitted that even in the absence of specific issue, the parties had led evidence and there was sufficient material for the Family Court to return a verdict of desertion having been proved. In the light of the submissions made by the learned counsel, we have opted to examine this aspect of the matter despite the fact that there was no specific issue framed or insisted to be framed.

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is

not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held:

"For the office of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a different between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus ort it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decide to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court."

Following the decision in Bipinchandra's case (supra) this Court again reiterated the legal position in ***Lachman Utamchand Kirpalani v. Meena alias Mota***[1] by holding that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation.

To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

There is another aspect of the matter which disentitles the appellant from seeking the relief of divorce on the ground of desertion in this case. As desertion in matrimonial cases means the withdrawal of one party from a state of things, i.e., a marital status of the party, no party to the marriage can be permitted to allege desertion unless he or she admits that after the formal ceremonies of the marriage, the parties had recognised and discharged the common obligation of the married life which essentially requires the cohabitation between the parties for the purpose of consummating the marriage. Cohabitation by the parties is an essential of a valid marriage as the object of the marriage is to further the perpetuation of the race by permitting lawful indulgence in passions for procreation of children. In other words, there can be no desertion without previous cohabitation by the parties. The basis for this theory is built upon the recognised position of law in matrimonial matters that no-one can desert who does not actively or wilfully bring to an end the existing state of cohabitation. However, such a rule is subject to just exceptions which may be found in a case on the ground of mental or physical incapacity or other peculiar circumstances of the case. However, the party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong.

In the instant case the appellant herself pleaded that there had not been cohabitation between the parties after the marriage. She neither assigned any reason nor attributed the non-resumption of cohabitation to the respondent. From the pleadings and evidence led in the case, it is apparent that the appellant did not permit the respondent to have cohabitation for consummating the marriage. In the absence of cohabitation between the parties, a particular state of matrimonial position was never permitted by the appellant to come into existence. In the present case, in the absence of cohabitation and consummation of marriage, the appellant was disentitled to claim divorce on the ground of desertion.

No evidence was led by the appellant to show that she was forced to leave the company of the respondent or that she was thrown away from the matrimonial home or that she was forced to live separately and that the respondent had intended animus deserendi. There is nothing on record to hold

1 [AIR 1964 SC 40]

that the respondent had ever declared to bring the marriage to an end or refuses to have cohabitation with the appellant. As a mater of fact the appellant is proved to have abandoned the matrimonial home and declined to cohabit with the respondent thus forbearing to perform the matrimonial obligation.

In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

For upholding the judgment and decree of the Family Court, Shri Dinesh Kumar Garg, the learned counsel appearing for the appellant submitted that as after the decree of divorce the appellant had remarried with one Sudhakar Pandey and out of the second marriage a child is also stated to have been born, it would be in the interest of justice and the parties that the marriage between them is dissolved by a decree of divorce. In support of his contention he has relied upon judgments of this Court in ***Anita Sabharwal v. Anil Sabharwal***[2]***, Shashi Garg (Smt.) v. Arun Garg***[3]***, Ashok Hurra v. Rupa Bipin Zaveri***[4] ***and Madhuri Mehta v. Meet Verma***[5]**.**

To appreciate such a submission some facts have to be noticed and the interests of public and society to be borne in mind. It appears that the marriage between the parties was dissolved by a decree of divorce vide the judgment and decree of the Family Court dated 8.7.1996. The respondent-husband filed appeal against the judgment and decree on 19.1.1997. As no stay was granted, the appellant solemnised the second marriage on 29.5.1997, admittedly, during the pendency of the appeal before the High Court. There is no denial of the fact that right of at least one appeal is a recognised right under all systems of civilised legal jurisprudence. If despite the pendency of the appeal, the appellant chose to solemnise the second marriage, the adventure is deemed to have been undertaken at her own risk and the ultimate consequences arising of the judgment in the appeal pending in the High Court. No person can be permitted to flout the course of justice by his or her overt and covert acts. The facts of the cases relied upon by the learned counsel for the appellant are distinct having no proximity with the facts of the present case. In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under Section 13B of the Act. This Court while allowing the applications filed under Section 13B took into consideration the circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lumpsum amount and permanent provision regarding maintenance.

This Court in ***Ms.Jorden Diengdeh v. S.S. Chopra***[6] suggested for a complete reform of law of marriage and to make a uniform law applicable to all people irrespective of religion or caste. The Court observed:

"It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. .... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of

2 [1997 (11) SCC 490]

3 [1997 (7) SCC 565]

4 [1997 (4) SCC 226]

5 [1997 (11) SCC 81]

6 [AIR 1985 SC 935]

legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves.

Marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in ***V. Bhagat v. Mrs.D.Bhagat***[7] held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.

As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage.

At this stage we would like to observe that the period of limitation prescribed for filing the appeal under Section 28(4) is apparently inadequate which facilitates the frustration of the marriages by the unscrupulous litigant spouses. In a vast country like ours, the powers under the Act are generally exercisable by the District Court and the first appeal has to be filed in the High Court. The distance, the geographical conditions, the financial position of the parties and the time required for filing a regular appeal, if kept in mind, would certainly show that the period of 30 days prescribed for filing the appeal is insufficient and inadequate. In the absence of appeal, the other party can solemnise the marriage and attempt to frustrate the appeal right of the other side as appears to have been done in the instant case. We are of the opinion that a minimum period of 90 days may be prescribed for filing the appeal against any judgment and decree under the Act and any marriage solemnised during the aforesaid period be deemed to be void. Appropriate legislation is required to be made in this regard. We direct the Registry that the copy of this judgment may be forwarded to the Ministry of Law & Justice for such action as it may deem fit to take in this behalf. There is no merit in these appeals which are dismissed with costs throughout.

(R.P. SETHI)
(Y.K. SABHARWAL)

January 8, 2002

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7 [AIR 1994 SC 710]

G.V.N. KAMESWARA RAO VS G. JABILLI

Appeal (Civil) 140 of 2002
Date of Judgment : 10/01/2002

(2002) 2 SCC 296

G.V.N. Kameswara Rao
Vs.
G. Jabilli

(Before Hon'ble Mr. Justice D.P. Mohapatra & Hon'ble Mr. Justice K.G. Balakrishnan, JJ.)

The husband who had been unsuccessfully fighting litigation for the past more than 15 years for snapping his marital ties with the respondent wife is the appellant before us. various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act.

Under Section 13(1) (ia) of the Hindu Marriage Act, on a petition presented either by the husband or wife, the marriage could be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, treated the petitioner with cruelty. 'Cruelty' is not defined in the Act. Some of the provisions of the Hindu Marriage Act were amended by Hindu Marriage Laws (Amendment) Act, 1976. Prior to the amendment, 'cruelty' was one of the grounds for judicial separation under Section 10 of the Act. Under that Section, "cruelty" was given an extended meaning by using an adjectival phrase, viz. "as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party". By the Amendment Act of 1976, "cruelty" was made one of the grounds for divorce under Section 13.

The omission of the words, which described 'cruelty' in the unamended Section 10 of the Hindu Marriage Act, has some significance in the sense that it is not necessary to prove that the nature of the cruelty is such as to cause reasonable apprehension in the mind of the petitioner that it would be harmful for the petitioner to live with the other party. English Courts in some of the earlier decisions had attempted to define "cruelty" as an act which involves conduct of such a nature as to have caused damage to life, limb or health or to give rise to reasonable apprehension of such danger. But we do not think that such a degree of cruelty is required to be proved by the petitioner for obtaining a decree for divorce. Cruelty can be said to be an act committed with the intention to cause sufferings to the opposite party. Austerity of temper, rudeness of language, occasional outburst of anger, may not amount to cruelty, though it may amount to misconduct.

"The mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties

cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must be had to the context in which they were made."

We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act. However, we make it clear that any order of maintenance passed in favour of the respondent will stand unaffected by this decree for dissolution of the marriage. We also make it clear that if any rights have been accrued to the respondent in the joint assets of both, she would be at liberty to take appropriate action to enforce such right.

JUDGMENT

K.G. Balakrishnan, J.

Leave granted.

The husband who had been unsuccessfully fighting litigation for the past more than 15 years for snapping his marital ties with the respondent wife is the appellant before us. The appellant is double doctorate holder -- one in Mathematics from Andhra University and another from U.S.A., and had been working in United States during the relevant period. The respondent is a post- graduate in Home Science and was working as a lecturer in the year 1979. The appellant came to India in 1979 and gave advertisement in the newspaper seeking matrimonial alliance from a suitable bride. The relatives of the respondent responded to the advertisement and there was mutual consultation between the parties, which led to the marriage of the appellant with the respondent on 30.7.1979. After the marriage, the appellant and respondent stayed together for some period and thereafter, the appellant left India for United States. The respondent was asked to join him after having obtained the visa and completing other formalities. The respondent, after a period of six months, joined the appellant in United States. It appears that the marital life of the appellant and the respondent ran into rough weather from the very beginning of their stay in United States. There used to be occasional quarrel between the parties. A daughter, Sandhya, was born to them on 10.6.1981. In 1982, the appellant, respondent and their daughter Sandhya came to India, but the appellant returned to United States in November 1982 itself and the respondent joined him only in April 1983. In January 1985, the respondent along with her daughter returned to India and it seems that the misunderstandings between the parties deepened and ultimately the appellant filed application for divorce under Section 13 of the Hindu Marriage Act,

1955 alleging that after the solemnization of their marriage, the respondent treated the appellant with cruelty.

The respondent contested the proceedings and denied all the allegations made by the appellant in the petition and also made counter-allegations alleging that the appellant was responsible for wrecking the marriage. Parties on either side examined witnesses to substantiate their allegations. The learned Family Court Judge after assessing the rival contentions and the evidence adduced by the parties, came to the conclusion that the respondent had treated the appellant with mental cruelty and, therefore, the appellant was entitled to get a decree for dissolution of marriage. This was challenged by the respondent before the Hon'ble High Court of Andhra Pradesh and the Division Bench of the High Court reversed the decision of the Family Court holding that the appellant was at fault and he had been trying to take advantage of his own wrongs; hence, he was not entitled to get a decree in his favour in view of Section 23(1)(a) of the Hindu Marriage Act. The Judgment of the Division Bench is challenged before us.

We heard learned Senior Counsel for the appellant, Mr. L. Nageswara Rao and Mr. M.N. Rao, learned Counsel on behalf of the respondent. The learned senior Counsel for the appellant contended that there was complete breakdown of the marriage due to the attitude of the respondent and the appellant was under severe mental agony and that the various acts committed by the respondent amounted to mental cruelty and the High Court was not justified in reversing the finding of the Family Court. The learned Counsel for the respondent, on the other hand, contended that there were differences of opinion between the appellant and the respondent on many matters, but the respondent had not done anything to cause mental pain or agony to the appellant. It was argued that the Family Court Judge passed his decision based on a solitary incident and, therefore, the same had been rightly reversed by the High court.

For proper appreciation of the disputes between the parties, it is necessary to consider the various allegations made by the appellant in his petition and also the counter-allegations made by the respondent in her reply. The appellant alleged that respondent entered into marriage with the appellant because of the persuasion of her sisters and brother and that the respondent was not taking any interest or co-operating to have a happy married life. The appellant alleged that the respondent joined him in the United States after a period of six months unwillingly, and right from the beginning of her life in United States, she picked up quarrel with the appellant and created scenes on many occasions. The appellant alleged that it was known to the Indian community, mainly to the people of Andhra Pradesh, who had settled down in and around the area where the appellant was residing, that the respondent was not having a good relationship with the appellant. He also alleged that the respondent was not doing any household work and the appellant had to do all the work himself and his brother Ravi, who was staying with him, was helping him. The appellant alleged that the respondent used to insult the appellant in the presence of his friends and guests and that the respondent was taking no interest in sharing bed with the appellant and this caused mental and physical agony to the appellant.

The respondent had denied all these allegations made by the appellant in the petition and she also made counter-allegations. But it is pertinent to note that the respondent has no case that they were having a happy married life and the attempt of the respondent was to put the blame at the doorstep of the appellant. She stated that the appellant had no interest to live with the respondent and was all the time attending parties, watching TV and playing cards and the respondent was completely neglected by the appellant. The respondent alleged that the appellant used to treat her as an intruder.

The respondent also stated that she was not given proper medical aid when she was in labour pain and had to give pre-mature birth to the baby without any medical assistance.

It is true that the Family Court rightly found that all the allegations made by the appellant in the petition were not satisfactorily substantiated by him. But nevertheless, some glaring facts are to be noted in this case. The married life of the appellant and respondent started in 1979 and right from the very beginning, the parties were under severe mental stress. Both the parties mutually tried to put the blame on each other. In 1982, the appellant, the respondent and their daughter returned to India. The respondent, however, refused to accompany the appellant back to the United States, and according to the appellant, she threw up the visa and other papers at him and joined him in United States only in 1983 and the subsequent evidence shows that the respondent had not willingly joined the appellant. She came back to India with her daughter in 1985. Though the appellant stated that the appellant's nephew, Ramu received her, she refused to talk to him and left with her own relatives. The respondent has denied these facts. However, it is important to note that the appellant has alleged that he did not know the whereabouts of the respondent and his child, at least for some period, after they returned to India. This is evident from the fact that the appellant wrote two letters to his daughter and these letters had to be re-directed to the address of the appellant. She was staying at Araku Valley, which was evidently not known to the appellant. The appellant stated that he suffered severe mental torture and, only after some searching inquiry, he could come to know that she was staying with her sister at Araku Valley. The appellant along with his two relatives went to Araku Valley to persuade the respondent to join the society of the appellant, but the very entry of the appellant and his relatives to the house was prevented by the respondent and later, only at the intervention of her sister, Suryakantham, they were permitted to enter the house. It may be noticed that the respondent and her child left United States in January 1985. The nature of the treatment meted out to the appellant by the respondent, even when he was meeting her after an interval of one year, is satisfactorily proved by the evidence of PW4 and his evidence was completely accepted by the Family Court Judge. The appellant being highly educated person having a position in life must have felt serious humiliation. The incident also shows that the respondent did not extend courteous behaviour to the appellant even in the presence of others. The conduct of the respondent assumes importance as this incident happened when they both were meeting each other after a long lapse of time.

Another important incident, which found favour with the Family Court is that the respondent had filed a criminal complaint before the police alleging that she was beaten by the appellant and his mother. The appellant and his mother were called to the police station and they had to be there for more than 10 hours. The explanation offered by the respondent for this incident is far from satisfactory. According to the respondent, she was being ill-treated by the appellant and his mother, and on one day, while preparing the breakfast when she used the blender for grinding the pulses, her mother-in-law got angry and scolded her saying that she had not brought any article from her house, so she should not have used the blender. Further, the respondent alleged that the appellant and his mother threw away all her bags and clothes and the appellant's mother asked her son to get the respondent out and the appellant became wild and gave a blow to the respondent with a sharp-edged weapon and it was under those circumstances that with bleeding injuries, she had gone to the police station and filed a complaint before the police. It is important to note that police did not register any case evidently as it was a domestic quarrel and not of a serious nature, and the incident shows the innate lack of self-control which had driven the respondent to this exorable conduct. But the humiliation and agony

suffered by the appellant and his mother, considering their status in life and the social circumstances, was too much.

Under Section 13(1) (ia) of the Hindu Marriage Act, on a petition presented either by the husband or wife, the marriage could be dissolved by a decree of divorce on the ground that the other party has, after the solemnization of the marriage, treated the petitioner with cruelty. 'Cruelty' is not defined in the Act. Some of the provisions of the Hindu Marriage Act were amended by Hindu Marriage Laws (Amendment) Act, 1976. Prior to the amendment, 'cruelty' was one of the grounds for judicial separation under Section 10 of the Act. Under that Section, "cruelty" was given an extended meaning by using an adjectival phrase, viz. "as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party". By the Amendment Act of 1976, "cruelty" was made one of the grounds for divorce underSection 13 and relevant provision reads as follows:-

"Divorce (1) Any marriage solemnized, whether before or after the commencement of the Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(i) .

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty, or (ib) ..

(ii)-(ix) "

The omission of the words, which described 'cruelty' in the unamended Section 10 of the Hindu Marriage Act, has some significance in the sense that it is not necessary to prove that the nature of the cruelty is such as to cause reasonable apprehension in the mind of the petitioner that it would be harmful for the petitioner to live with the other party. English Courts in some of the earlier decisions had attempted to define "cruelty" as an act which involves conduct of such a nature as to have caused damage to life, limb or health or to give rise to reasonable apprehension of such danger. But we do not think that such a degree of cruelty is required to be proved by the petitioner for obtaining a decree for divorce. Cruelty can be said to be an act committed with the intention to cause sufferings to the opposite party. Austerity of temper, rudeness of language, occasional outburst of anger, may not amount to cruelty, though it may amount to misconduct.

This Court, in Dr. N. G. Dastane vs. Mrs. S. Dastane AIR 1975 SC 1534 held at page154, paragraph 34 as follows:-

"We do not propose to spend time on the trifles of their

married life. Numerous incidents have been cited by the appellant as constituting cruelty but the simple trivialities which can truly be described as the reasonable wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas."

The Court has to come to a conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs,

traditions and other similar circumstances. Having regard to the sanctity and importance of marriages in a community life, the Court should consider whether the conduct of the counter- petitioner is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible, and then only the Court can find that there is cruelty on the part of the counter-petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances.

This Court had an occasion to consider this question in some cases.

In S. Hanumantha Rao vs. S. Ramani 1999 (3) SCC 620, the husband alleged that the respondent wife had no interest in the marriage life and within a period of two months of the marriage, she went back to her parents house and stayed there for two and a half months. After about six months, she took off her mangalsutra and threw it at the appellant. The respondent wife explained that she removed the mangalsutra in privacy and handed over the same to the appellant on his own request. This Court held that removal of mangalsutra would not constitute cruelty within the meaning of Section 13(1)(ia).

In V. Bhagat vs. D. Bhagat(Mrs.) 1994(1) SCC 337, the husband was a practicing lawyer and the respondent wife was working in a television company at the time of marriage. They had a grown up son and a daughter. The husband alleged adultery on the part of the respondent. Respondent wife denied the allegations and she also suggested that the appellant was suffering from some mental hallucination. This Court, in paragraph 16 at page 347, observed as under:-

"The mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must be had to the context in which they were made."

The case of the appellant that he had been subjected to cruelty by the wife is not put as such solely on the basis of one or two incidents. Their marriage life started in 1979 with so many ups and downs. Both of them did not live together for a longer period as happily married couple. The appellant has succeeded in proving that the attitude of the respondent was not cordial and cooperative. The respondent also alleged that their marriage life was not happy and cheerful. The way in which the appellant was treated by the respondent when he visited her sister's house at Araku Valley and the subsequent filing of the criminal complaint whereby the appellant was subjected to severe humiliation would go to show that the respondent was not prepared to extend any kind of cooperation to the appellant. The respondent's allegation that she was physically assaulted by the appellant and his mother is not very convincing. The fact that there was a bleeding injury on her hand was taken note of seriously by the High Court but the question is, in those circumstances, would an ordinary prudent person rush to the police station and file a complaint to see that her husband and his mother be kept in police custody for unduly long hours. These incidents throw an insight into her past conduct when she was staying with the appellant. The mental cruelty faced by the appellant is to be assessed having regard to his status in his

life, educational background, the environment in which he lived. The appellant could have suffered traumatic experience because of the police complaint and the consequent loss of reputation and prestige in the society. Married life of the appellant with the respondent had never been happy. The appellant would say that from 1985 onwards, he has not been having conjugal relationship with the respondent and even prior thereto the respondent was not properly discharging her marital obligations.

The High Court has held in the impugned judgment that the appellant himself was responsible for many of the unhappy incidents and therefore, he shall not be allowed to take advantage of his own fault and the decree for dissolution of marriage shall be denied to him in view of Section 23(1)(a) of the Hindu Marriage Act. We do not think that the High Court was justified in holding this view. The decision was based on the fact that the appellant had executed a power of attorney in favour of his brother-in-law, Rama Rao, authorizing him to take steps for seeking divorce in the year 1982. The appellant admitted having executed that power of attorney. According to the appellant, the respondent, after she came to India in 1982, refused to come back to United States even after much persuasion and under those circumstances, he executed the power of attorney, but later on came to know that power of attorney holder could not file an application. That would only show that right from 1982, the relationship between the appellant and the respondent was not good and the parties thought of divorce. But the appellant did not file any application in 1982. As regards the incident relating to police complaint also, in his statement the appellant had admitted that the respondent had a scratch injury. But there is nothing in the evidence to show that either the appellant or his mother caused any serious injury to the respondent.

We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act. However, we make it clear that any order of maintenance passed in favour of the respondent will stand unaffected by this decree for dissolution of the marriage. We also make it clear that if any rights have been accrued to the respondent in the joint assets of both, she would be at liberty to take appropriate action to enforce such rights. The appeal is allowed. Parties to bear their respective costs.

(D.P. MOHAPATRA)
(K.G. BALAKRISHNAN)

January 10, 2002.

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MAHARANI KUSUMKUMARI AND ANR. VS. SMT. KUSUMKUMARI JADEJA AND ANR.

1991 SCR (1) 193

1991 SCC (1) 582 JT 1991 (1) 278 1991 SCALE (1)103

Petitioner: Maharani Kusumkumari and Anr.
Vs.
Respondent: Smt. Kusumkumari Jadeja and Anr.

Date of Judgment : 01/02/1991

(Before Hon'ble Mr. Justice L.M. Sharma & Hon'ble Mr. Justice M.M. Punchhi, JJ.)

Hindu Marriage Act, 1955: Section II-Petition to declare marriage a nullity-Whether maintainable after death of petitioner's spouse.

Practice and Procedure: Proceedings involving issues relating to marital status-Question dependent upon nature of action and the law governing the same-Provisions of the relevant statute very material.

It was contended on behalf of the appellants that having regard to the very special relationship between husband and wife,a marriage cannot be dissolved or declared to be a nullity unless both of them are parties thereto. The martial status of a person sands on a much higher footing than other positions one may hold in the society and cannot be allowed to be challenged lightly,and that the marriage of a person, therefore, cannot be declared as nullity after his death when he does no have an opportunity to contest. Reliance was placed upon the language of Section 11 of the Hindu Marriage Act.

On behalf of the respondent, it was pointed out that having regard to the language of Section 16 of the Hindu Marriage Act as it it stood before its amendment in 1976,he children born of the respondent would not have been entitled to the benefit of the section in absence of a decree declaring the marriage of their parents as nullity, and this was precisely the reason that the respondent had to commence the present litigation

On the question: whether a petition under Section 11 of the Hindu Marriage Act, 1955 for declaring the marriage of the petitioner as a nullity is maintainable after the death of the petitioner's spouse.

Dismissing the appeal, this Court,

HELD: An application under Section11 of the Hindu Marriage Act, 1955 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse.

In the instant case, the proceeding was started in 1974 that is, before the amendment was made in the Hindu Marriage Act,1955. Section II did not contain the words "against the other party". At that time all that was required was that the application had to be filed by a party to the marriage

under challenge. On the plain language of the section as it stood then,it could not be claimed that in absence of the other spouse as a party to the proceedings, the same would not be maintainable.

By the amendment in section 11, in so far the cases where marriage can be declared as nullity, the application of the rule protecting the legitimacy was widened. If that had not been,the children born of such marriages would have been deprived of the advantage on the death of either of the parents.

The intention of the legislature in enacting section 16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955.

There is no reason to interpret section 11 in a manner which would narrow down its field. With respect to the nature of the proceedings, what the court has to do in an application under section 11 is not to bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flow in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No.2215 of 1977.

From the Judgement and Order dated 237 1976 of the Madhya Pradesh High Court in Misc. Appeal No.23 of 1976.

T.U. Metha, S.K. Gambhir, Vivek Gambhir and Surinder Karnail for the Appellants.

Uday U. Lalit and A.G.Ratnaparkhi for the Respondents.

The Judgement of the Courtwas delivered by **SHARMA. J.** The question for decision in this appeal by special leave is whether a petition under s.11 of the Hindu Marriage Act, 1955, for declaring the marriage of the petitioner as nullity is maintainable after the death of the petitioners' spouse.

2. The appellant no. 1, hereinafter referred to as the Maharani, was married to Maharaja Rameshwarsighji in1960 and a daughter, the appellant no.2, was born of the wedlock in 1964. The relationship between the husband and the wife thereafter ceased to be cordial and the appellants started living in Bombay and the Maharaja within his estate in Madhya Pradesh. According to the case of the respondent no.1 the Maharaja decided to remarry without legally separating from the appellant Maharani. The respondent who is a relation of the Maharaj's mother, respondent No.2, was misled both by the Maharaja and his mother in believing that the first marriage of the Maharaja had been dissolved and under the belief she married the Maharaja and the couple got several issues. In 1974 when the Maharaja died, an application for grant of Letters of Administration was filed by the appellant Maharani and the respondent applied for probate on the basis of an alleged will which is denied by the appellant. The proceedings are still pending. In this background the respondent no. 1 filed the present application under s. 11 of the Hindu Marriage Act for declaring her marriage as nullity. The Maharaja's mother was impleaded as the sole respondent. When the appellants learnt about the case, they intervened and were joined as parties.

3. The appellants challenged the maintainability of the application on the ground that the marriage could not be declared nullity after the death of the Maharaja. Both the trial court and the High Court have rejected the appellants' plea.

4. Mr. Mehta, the learned counsel for the appellants, has contended that having regard to the very special relationship between husband and wife, a marriage cannot dissolved or declared to be a nullity unless both of them are parties thereto. The marital status of a person stands on a much higher footing than other positions one may hold in the society or may have in relation to a property; and cannot be allowed to be challenged lightly. The marriage of a person, therefore, cannot be declared as a nullity after his death when he does not have an opportunity to contest. He relied upon the language of s.11. After its amendment in 1976 the section read this:

> *"11. Void marriages:- Any marriage solemnized after the commencement of this Act shall be null and void and may , on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i),(iv) and (v) of Section 5." (emphasis added)*

5. The present proceeding was started in 1974, that is, before the amendment, and the section did not contain the words which have been underlined by us above. At that time all that was required was that the application had to be filed by a party to the marriage under challenge. On the plain language of the section as it stood then, it could not be claimed that in absence of the other spouse as a party to the proceeding, the same would not be maintainable. The argument of Mr. Mehta is that the section had the same meaning before and after the amendment and the addition of the words in 1976 was merely clarificatory in nature. He strongly relied upon the 69th Report of the Law Commission.

6. The Report recommended several amendments in the Hindu Marriage Act which led to the passing of the Amending Act of 1976.

Reliance was placed on paragraph 6.1A of Chapter 6 of the Report which referred to the divergent views taken by the High Courts of Punjab and Madras on the question of maintainability of a petition under s.11 after the death of the other spouse. The Commission, thereafter, observed thus:

> *"We ought, however, to point out that in such a case, the proper remedy is a suit under the Specific Relief Act. A petition under section 11 of the Hindu Marriage Act cannot be appropriate, because the other spouse is an essential party to any such petition. This should be clarified by an amendment."*

It has been argued before us that the view of the Madras High Court referred to in the Report is the correct view which was accepted by the Law Commission, and since there was scope for controversy on the language of the section, the legislature agreeing with the Law Commission added the aforementioned additional words by way of clarification. It is urged that such interpretation of the section did not lead to any injustice inasmuch as a suit for such a declaration was and is maintainable in the civil court. Reliance has also been placed on "Rayden and Jackson's Law and Practice in Divorce and Family matters." (15th Edn.), and several English cases in support of the proposition that on the death of a party to a matrimonial action the cause of action does not service. Reference has been made to the case of Butterfield v. Butterfield, I.L.R. (Vol.50) Calcutta 153, where after the wife had obtained a decree nisi for dissolution of her marriage the husband died. Following the English case of Stanhope v. Stanhope,[1886] 11 P.D.103, it was held that the decree could not be confirmed.

7. The learned counsel for the respondent relied upon certain observation made in other High Courts' judgments supporting his stand. He pointed out that having regard to the language of s. 16, as it stood before the amendment, the children born of the respondent would not have been entitled to the benefit of the section in the absence of a decree declaring the marriage of their parents as nullity, and this was precisely the reason that the respondent had to commence the present litigation.

8. We have considered the argument of Mr. Mehta closely but do not find ourselves in a position to agree with him. It is not correct to suggest that one uniform rule shall apply for deciding the maintainability of all proceedings involving issues relating to marital status. The question will be dependent upon the nature of the action and law governing the same. The provisions of the relevant statute relating to a proceeding in question will be very material. This aspect has been taken note of by Rayden and Jackson also in their book which has been relied upon by Mr. Mehta. The passage at page 650 summarises the position in the following words:

> *"Death of a party: effect on suit. In many cases the fact of the death of one of the parties will render the process meaningless by reason of the circumstances that a marriage brought to an end by death could no longer be dissolved by an Act of the court. But there is no general rule that, where one of the parties to a divorce suit has died, the suit abates, so that no further proceedings can be taken in it. It has been said that it is unhelpful to refer to abatement at all. The real question in such cases is whether, where one of the parties to a divorce suit has died, further proceedings in the suit can or cannot be taken. The answer to that question, when it arises, depends in all cases on two matters and in some cases also on a third. The first matter is the nature of the further proceedings sought to be taken. The second matter is the true construction of the relevant statutory provision or provisions, or of a particular order made under them, or both. The third matter is the applicability of section I (I) of the Law Reforms (Miscellaneous Provisions) Act 1934."*

9. The dispute issue in the present appeal has to be answered by considering the nature of the proceedings and the true construction of the relevant provisions of the Hindu Marriage Act. Under the general law a child for being legitimate has to be born in lawful wedlock, and if the marriage is void or declared to be so by the court, it will necessarily have the effect of bastardising the child born of the parties to such a marriage. By enacting s. 5(i) of the Act, the legislature abolished polygamy, which had always remained permissible and prevalent among the Hindus in the past. The Act was bringing about a very significant departure in this regard; and taking into account the possibility of violation of the law in numerous cases atleast for sometime to come special provisions were included under s.16 of the Act with the object of protecting the legitimacy of the children. The original section before the amendment of 1976 read as follows:

> *"16. Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity.*
>
> *Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void annulled by a decree of nullity*

any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possession of acquiring any such rights by reason of his not being the legitimate child of his parents."

It will be seen that the benefit of the section was confined to only such cases where a decree of nullity was granted under s. 11 or s.12. it did not extend to other cases. In 1976 s.11 was amended by inserting the words "against the other party", and along with the same s.16 was amended as it read now. the following words in s. 16(i).

"...and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act."

enlarged the applicability of the beneficial provisions, so as not to deny the same to children who are placed in circumstances similar to those of the present respondent. By the amendment in s.11, in so far the cases where marriage can be declared as nullity, the application of the rule protecting the legitimacy was widened. If that had not been done, the children born of such marriage would have been deprived of the advantage on the death of either of the parents. By the simultaneous amendment of the two sections it can safely be deduced that the Parliament did not hold identical views as expressed by the Law Commission's Report.

10. Even if it be assumed that the meaning of the section was not free from ambiguity, the rule of beneficial construction is called for in ascertaining its meaning. The intention of the legislature in enacting s.16 was to protect the legitimacy of the children who would have been legitimate if the Act had not been passed in 1955. There is no reason to interpret s.11 in a manner which would narrow down its field. With respect to the nature of the proceeding, what the court has to do in an application under s.11 is not bring about any change in the marital status of the parties. The effect of granting a decree of nullity is to discover the flaw in the marriage at the time of its performance and accordingly to grant a decree declaring it to be void. we, therefore, hold that an application under s.11 before its amendment in 1976, was maintainable at the instance of a party to the marriage even after the death of the other spouse. Accordingly, this appeal is dismissed with costs.

Appeal dismissed

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DHARMENDRA KUMAR VS. USHA KUMAR

1977 AIR 2218

1978 SCR (1) 315 1977 SCC (4) 12
DATE OF JUDGMENT 19/08/1977

Petitioner: Dharmendra Kumar
Vs.
Respondent: Usha Kumar

(Before Hon'ble Mr. Justice A.C. Gupta & Hon'ble Mr. Justice Syed Murtaza Fazalali, JJ.)

Hindu Marriage Act 1955-Section 13(1A)(ii).-23(1)(a)-If divorce can be obtained for absence of restitution of conjugal rights after decree for restitution is granted by a person who refuses to have restitution-Whether such a conduct amounts to a wrong within the meaning of sec. 23 (1) (a) of the Act.

The respondent-wife was granted a decree for restitution of conjugal rights on her application under s. 9 of Hindu Marriage Act, 1955 by Additional Senior Sub-Judge, Delhi the respondent presented a petition under s. 13(1A) (ii) of the Act in the Court of Additional District Judge, Delhi for dissolution of the marriage by a decree of divorce-stating therein that there bad been no restitution of conjugal rights between the parties after the passing of the decree for restitution of conjugal rights. The appellant-husband, in his written statement admitted that there had been no restitution of conjugal rights, between the parties after the passing of the decree in earlier proceedings, but stated that he made attempts to comply with the decree dated 27th August 77 by writing several registered letters inviting the respondent to live with him to which, according to him she never replied. The husband contended that she herself prevented the restitution of conjugal rights and was making a capital out of her own wrong which she was not entitled to do.

Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce. The party against whom the decree was passed was not given that right. The relief which is available to the spouse against whom a decree for restitution of conjugal rights has been passed cannot reasonably be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a "wrong" within the meaning of s. 23(1)(a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. Mere non-compliance with a decree for restitution does not constitute wrong within the meaning of section 23(1)(a)

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 949 of 1977.

Appeal by Special Leave from the Judgment and Order dated 19-10-1976 of the Delhi High Court in F.A.0., No. 170 of 1976.

Naunit Lal, R. K. Baweja and Miss Lalita Kohli, for the Appellant.

S. L. Watel, C. R. Somasekharan, R. Watel and M. S. Ganesh, for the Respondent.

The following Judgment of the Court was delivered by

GUPTA, J.-On her application made under section 9 of the Hindu Marriage Act, 1955, the respondent was granted a decree for restitution of conjugal rights by the Additional Senior Sub-Judge, Delhi on August 27, 1973. A little over two years after that decree was passed, on October 28, 1975 she presented a petition under section 13 (IA) (ii) of the Act in the Court of the Additional District Judge, Delhi, for the dissolution of the marriage by a decree of divorce. Section 13 (IA) (ii) as it stood at the material time reads :

> *"Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-*
>
> *(i) x x x*
>
> *(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.*
>
> *The provision was amended in 1976 reducing the period of two years to one year, but this amendment is not relevant to the present controversy. In the petition under section 1 3 (IA)*
>
> *(ii) she-we shall hereinafter refer to her as the petitioner-stated that there had been 'no restitution of conjugal rights between the parties to the marriage after the passing of the decree for restitution of conjugal rights and that there was no other legal ground why the relief prayed for should not be granted. Her husband, the appellant before us, in his written statement admitted that there had been no restitution of conjugal rights between the parties after the passing of the decree in the earlier proceeding, but stated that he made attempts "to comply with the decree (for restitution of conjugal rights) by writing several registered letters to the petitioner" and "otherwise" inviting her to live with him. He complained that the petitioner "refused to receive some of the letters and never replied to those which she received", and according to him the petitioner "has herself prevented the restitution of conjugal rights she prayed for and now seeks to make a capital out of her own wrong". The objection taken in the written statement is apparently based on section 2 3 (1) (a) of the Act. The relevant part of section 2 3 (1) (a) states :*

Decree in proceedings.

> *"23. (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-*

(a) any of the grounds for granting relief exists and the petitioner..... is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief....."

On the pleadings the following issue was raised as issue No. 1

"Whether the petitioner is not in any way taking advantage of her own wrong for the reasons given in the written statement ?"

Subsequently the following additional issue was also framed

"Whether the objection covered by issue No. 1 is open to the respondent under the law ?"

This additional issue was heard as a preliminary issue. The Additional District Judge, Delhi, who heard the matter, relying on a Full Bench decision of the Delhi High Court reported in I.L.R. (1971) 1 Delhi 6, (Ram Kali v. Gopal Dass), and a later decision of a learned single Judge of that court reported in I.L.R. (1076) 1 Delhi 725, (Gajna Devi v. Purshotam Giri) held that no such circumstance has been alleged in the instant case from which it could be said that the petitioner was trying to take advantage of her own wrong and, therefore, the objection covered by issue No. 1 was not available to the respondent The Additional District Judge accordingly allowed the petition and granted the petitioner a decree of divorce as prayed for. An appeal from this decision taken by the husband was summarily dismissed by the Delhi High Court. In the present appeal the husband questions the validity of the decree of divorce granted in favour of the petitioner.

Section 13 (IA) (ii) of the Hindu Marriage Act, 1955 allows either party to a marriage to present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for the period specified in the provision after the passing of the decree for restitution of conjugal rights. Sub-section (IA) was introduced in section 13 by section 2 of the Hindu Marriage (Amendment) Act, 1964 (44 of 1964). Section 13 as it stood before the 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce; the party against whom the decree was passed was not given that right. The grounds for granting relief under section 1 3) including sub-section (IA) however continue to be subject to the provisions of section 23 of the Act. We have quoted above the part of section 23 relevant for the present purpose. It is contended by the appellant that the allegation made in his written statement that the conduct of the petitioner in not responding to his invitations to live with him meant that she was trying to take advantage of her own wrong for the purpose of relief under section 1 3 (1 A) (ii) On the admitted facts, the petitioner was undoubtedly entitled to ask for a decree of divorce. Would the allegation, if true, that she did not respond to her husband's invitation to come and live with him disentitle her to the relief ? We do not find it possible to hold that it would. In Ram Kali's case (supra) a Full Bench of the Delhi High Court held that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of section 2 3 (1) (a). Relving on and explaining this decision in the later case of Gajna Devi v. Purshotam Giri (supra) a learned Judge of the same High Court observed "Section 23 existed in the statute book prior to the insertion of section 13(1A)..... Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of section 23 of the Act, not entitled to obtain divorce, then it would have inserted an exception to section 13 (1 A) and with such exception, the provision of section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore, cannot be construed so as to make the effect

of amendment of the law by insertion of section 13(1A) nugatory advantage of his or her own wrong" occurring in clause(a) of section 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of marriage which has been conferred on him by section 13(1A).

In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree....."

In our opinion the law has been stated correctly in Ram Kali v. Gopal Das (supra) and Gajna Devi v. Purshotam Giri (supra). Therefore, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a 'wrong' within the meaning of section 23 (1) (a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. In the case before us the only allegation made in the written statement is that the petitioner refused to receive or reply to the letters written by the appellant and did not respond to his other attempts to make her agree to Eve with him. This allegation, even if true, does not amount to misconduct grave enough to disentitle the petitioner to the relief she has asked for. The appeal is therefore dismissed but without any order as to costs.

Appeal dismissed.

❑❑❑

NARAYAN GANESH DASTANE VS. SUCHETA NARAYAN DASTANE

1975 AIR 1534

1975 SCR (3) 967 1975 SCC (2) 326
DATE OF JUDGMENT 19/03/1975

Petitioner: Narayan Ganesh Dastane
Vs.
Respondent: Sucheta Narayan Dastane

(Before Hon'ble Mr. Justice Y.V. Chandrachud, Hon'ble Mr. Justice P.K. Goswami & Hon'ble Mr. Justice N.L. Untwalia, JJ.)

Hindu Marriage Act--Section 10(1)(b) and 23(1)(a)(b)--Meaning of cruelty--Burden of proof in matrimonial matters--Whether beyond reasonable doubt--Condonation--of cruelty--Whether sexual intercourse amounts to condonation--Whether condonation is conditional--Revival of cruelty.

Code of Civil Procedure--Section 100 and 103--Powers of High Court in second appeal.

The appellant husband filed a petition for annulment of marriage on the ground of fraud, for divorce on the ground of unsoundness of mind and for judicial separation on the ground of cruelty. The appellant and respondent possess high educational qualifications and they were married in 1956. Two children were born of the marriage one in 1957 and the other in 1959.

The Trial Court rejected the contention of fraud and unsoundness of mind. It, however, held the wife guilty of cruelty and on that ground passed a decree for judicial separation. Both sides went in appeal to the District Court which dismissed the husband's appeal and allowed the wife's. The husband then filed a Second Appeal in the High Court.

The High Court dismissed that appeal.

On appeal to this Court,

Neither s.10 nor s. 23 of the Hindu Marriage Act requires that the petitioner must prove his case beyond reasonable doubt S. 23 confers on the court the power to pass a decree if it is satisfied on the matters mentioned in Clauses (a) to (e) of that Section. Considering that proceedings under the Act are essentially of a civil nature the word 'satisfied' must mean satisfied on a preponderance of probabilities and not satisfied beyond a reasonable doubt. The society has a stake in the institution of marriage and, therefore, the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for- the dissolution of marriage, it has no bearing on the standard of proof in matrimonial cases. In England, a view was at one time taken that a petitioner in a matrimonial petition must establish his or her case beyond a reasonable doubt but the House of Lords in Blyth v. Blyth has held that the grounds of divorce or the bars to the divorce May be proved by a preponderance of probability

On the question of condonation of cruelty, a specific provision of a specific enactment has to be interpreted, namely s. 10(1) (b). The enquiry, therefore, has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English Law, that the cruelty must be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such a danger.

Acts like the tearing of the Mangal Sutra, locking out the husband when he is due to arrive from the office, rubbing of chilly powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. The conduct of wile amounts to cruelty within the meaning of s. 10(1) (b) of the Act. The threat that she would put an end to her own life or that she will set the house on fire, the threat that she will make the husband lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the husband and his parents are all of so grave an order as to 'imperil the appellant's sense of personal safety, mental happiness, job satisfaction and reputation.

JUDGMENT

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2224 of 1970.

From the judgment and order dated the 19th February, 1969 of the Bombay High Court in Second Appeal No. 480 of 1968.

V. M. Tarkunde, S. Bhandare, P. H. Parekh and Manju Jaitely, for the appellant.

V. S. Desai, S. B. Wad and Jayashree Wad, for the respondents.

The Judgment of the Court was delivered by

CHANDRACHUD, J.-This is a matrimonial dispute arising out of a petition filed by the appellant for annulment of his marriage with the respondent or alternatively for divorce or for judicial separation. The annulment was sought on the ground of fraud, divorce on the ground of unsoundness of mind and judicial separation on the ground of cruelty.

The spouses possess high academic qualifications and each one claims a measure. of social respectability and cultural sophistry. The evidence shows some traces of these. But of this there need be no doubt,: the voluminous record which they have collectively built up in the case contains a fair reflection of their rancour and acrimony, The appellant, Dr. Narayan Ganesh Dastane, passed his M.Sc. in Agriculture from the Poona University. He was sent by the Government of India to Australia in the Colombo Plan Scheme. He obtained his Doctorate in Irrigation Research from an Australian University and returned to India in April, 1955. He worked for about 3 years as an Agricultural Research Officer and in October, 1958 he left Poona to take charge of a new post as an Assistant Professor of Agronomy in the 'Post-Graduate School, Pusa Institute, Delhi. At present be is said to be working on a foreign assignment.

His father was a solicitor-cum lawyer practising in Poona.

The respondent, Sucheta, comes from Nagpur but she spent her formative years mostly in Delhi. Her father was transferred to Delhi in 1949 as an Under Secretary in the Commerce Ministry of the Government of India and she came to Delhi along with the rest of the family. She passed her B.Sc. from the Delhi University in 1954 and spent a year in Japan where her father was attached to the

Indian Embassy. After the rift in her marital relations, she obtained a Master's Degree in Social Work. She has done field work in Marriage Conciliation and Juvenile Delinquency. She is at present working in the Commerce and Industry Ministry, Delhi.

In April, 1956 her parents arranged her marriage with the appellant. But before finalising the proposal, her father- B. R. Abhyankarwrote two letters to the appellant's father saying in the first of these that the respondent "had a little misfortune before going to Japan in that she had a bad attack of sunstroke which affected her mental condition for sometime". In the second letter which followed at an interval of two days, "cerebral malaria" was mentioned as an additional reason of the mental affectation. The letters stated that after a course of treatment at the Yeravada Mental Hospital, she was cured : "you find her as she is today". The respondent's father asked her appellant's father to discuss the matter, if necessary, with the doctors of the Mental Hospital or with one Dr. P. L. Deshmukh, a relative of the respondent's mother. The letter was written avowdely'in order that the appellant and his people "should not be in the dark about an important episode" in the life of the respondent, which "fortunately, had ended happily".

Dr. Deshmukh confirmed what was stated in the letters and being content with his assurance, the appellant and his father made no enquiries with the Yeravada Mental Hospital. The marriage was performed at Poona on May 13, 1956. The appellant was then 27 and the respondent 21 years of age.

They lived at Arbhavi in District Belgaum from June to October, 1956. On November 1, 1956 the appellant was transferred to Poona where the two lived together till 1958.

During this period a girl named Shubha was born to them on March 11, 1957. The respondent delivered in Delhi where ,her parents lived and returned to Poona in June, 1957 after an absence, normal on such occasions, of about 5 months. In October, 1958 the appellant took a job in the Pusa Institute of Delhi, On March 21, 1959 the second daughter, Vibha, was born. The respondent delivered at Poona where the appellant's parents lived and returned to Delhi in August, 1959. Her parents were living at this time in Djakarta, Indonesia.

In January, 1961, the respondent went to Poona to attend the marriage of the appellant's brother, a doctor-by profession, who has been given an adoption in the Lohokare family. A fortnight after the marriage, on February 27, 1961 the appellant who had also gone to Poona for the marriage got the respondent examined by Dr. seth, a Psychiatrist in charge of the Yeravada Mental Hospital. Dr. Seth probably wanted adequate data to make his diagnosis and suggested that he would like to have a few sittings exclusively with the respondent. For reasons good or bad, the respondent was averse to submit herself to any such scrutiny. Either she herself or both she and the appellant decided that she should stay for some time with a relative of bers, Mrs-Gokhale. On the evening of the 27th, she packed her titbits and the appellant reached her to Mrs. Gokhale's house.

There was no consultation thereafter with Dr. Seth.

According to the appellant, she had promised to see Dr, Seth but she denies that she made any such promise. She believed that the appellant was building up a case that she was of unsound mind and she was being lured to walk into that trap.

February 1961 was the last that they lived together-. But on the day of parting she was three months in the family way. The third child, again a girl, named Pratibha was born on August 19, 1961 when her parents were in the midst of a marital crisis.

Things had by then come to an impossible pass. And close relatives instead of offering wise counsel were fanning the fire of discord that was devouring the marriage. A gentleman called Gadre whose letter-head shows an "M.A. (Phil.) M.A. (Eco.) LL.B.", is a maternal uncle of the respondent. On-March 2, 1961 he had written to tile appellant's father a pseudonymous letter now proved to be his, full of malice and sadism. He wrote :

> *"I on my part consider myself to be the father of 'Brahmadev ..... This is only the beginning. From the spark of your foolish and half-baked egoism, a big conflagration of family quarrels will break out and all will perish therein This image of the mental agony suffered by all your kith and' kin gives me extreme happiness..... You worthless person, who cherishes a desire to spit on my face, now behold that all the world is going to spit on your old cheeks.*
>
> *So why should I loose the opportunity of giving you a few severe slaps on your cheeks and of fisting your ear. It is my earnest desire that the father-in-law should beat your son with foot-ware in a public place."*

On March 11, 1961 the appellant returned to Delhi all alone. Two days later the respondent followed him but she went straight to her parents' house in)Delhi. On the 15th, the appellant wrote a letter to the police asking for protection as he feared danger to his life from the respondent's parents and relatives. On the 19th, the respondent saw the appellant but that only gave to the parties one more chance to give vent to mutual dislike and distrust. After a brief meeting, she left the broken home for good. On the 20th, the appellant once again wrote to the police renewing his request for protection.

On March 23, 1961 the respondent wrote to the appellant complaining against his conduct and asking for money for the maintenance of herself and the daughters. On May 19, 1961 the respondent wrote a letter to the Secretary, Ministry of Food and Agriculture, saying that the appellant had deserted her, that he had treated her with extreme cruelty and asking that the Government should make separate provision for her maintenance. On March 25, her statement was recorded by an Assistant Superintendent of Police, in which she alleged desertion and ill-treatment by the appellant. Further statements were recorded by the police and the Food Ministry also followed up respondent's letter of May 19 but ultimately nothing came out of these complaints and cross complaints. As stated earlier, the third daughter, Pratibha, was born on August 19, 1961. On November 3, 1961 the appellant wrote to respondent's father complaining of respondent's conduct and expressing regret that not even a proper invitation was issued to him when the naming ceremony of the child was performed. On December 15, 1961 the appellant wrote to respondent's father stating that he had decided to go to the court for seeking separation from the respondent. The proceedings out of which this appeal arises were instituted on February 19, 1962.

The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife in contrast to non-Hindu wives as if wotmen professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the peculiar habits, ideas, susceptibilities and expectations of persons belonging to the strata of society to which these two belong. All circumstances which constitute the ,occasion or setting for the conduct complained of have relevance but we think that no assumption can be made that

respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a secular examination.

The appellant asked for annulment of his marriage by a decree of nullity under section 12(1) (c) of 'The Hindu Marirage Act', 25 of 1955, ("The Act") on the ground that his consent to the marriage was obtained by fraud. Alternatively, he asked for divorce under section 13 (1) (iii) on the ground that the respondent was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. Alternatively, the appellant asked for Judicial separation under section 10(1) (b) on the ground that the respondent had treated him with such cruelty as to cause a reasonable apprehension in his mind that. it would be harmful or injurious for him to live with her.

The appellant alleged that prior to the marriage, the respondent was treated in the Yeravada Menfal Hospital for Schizophrenia but her father fraudulently represented that she was treated for sun-stroke and cerebral malaria. The trial court rejected this contention. It also rejected the contention that the respondent was of unsound mind.It,however, held that the respondent was guilty of cruelty and on that ground it passed a decree for judicial separation.

Both sides went in appeal to the District Court which dismissed the appellant's appeal and allowed the respondent's, with the result that the petition filed by the appellant stood wholly dismissed.

The appellant then filed Second Appeal No. 480 of 1968 in the Bombay High Court. A learned single Judge of that court dismissed that appeal by a judgment dated February 24, 1969.

This Court granted to the appellant special leave to appeal, limited to the question of judicial separation on the ground of cruelty.

We are thus not concerned with the question whether the appellant's consent to the marriage was obtainede by fraud or whether the respondent bad been of unsound mind for the requisite period preceding the presentation of the petition.

The decision-of the-High Court on those questions must be treated as final and can not be reopened. In this appeal by special leave, against the judgment rendered by the High Court in Second Appeal, we would not have normally permitted the parties to take us through the evidence in the case. Sitting in Second Appeal, it was not open to the High Court itself to reappreciate evidence. Section 100 of the Code of Civil Procedure restricts the jurisdiction of the High Court in Second appeal to questions of law or to substantial errors or defects in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. But the High Court came to the conclusion that both the courts below had "failed to apply the correct principles of law in determining the issue of cruelty". Accordingly, the High Court proceeded to consider the evidence for itself and came to the conclusion independently that the appellant had failed to establish that the respondent had treat him with cruelty. A careful consideration of the evidence by the High Court ought to be enough assurance that the finding of fact is correct and it is not customary for this Court in appeals under Article 136 of the Constitution to go into minute details of evidence and weigh them one against the other, as if for the first time. Disconcertingly, this normal process is beset with practical difficulties.

In judging of the conduct of the respondent, the High Court assumed that the words of abuse or insult used by the respondent "could not have been addressed in vacuum. Every abuse, insult, remark or retort must have been probably in exchange for remarks and rebukes from the husband..... a court is bound to consider the probabilities and infer, as I have done, that they must have been in the context

of the abuses, insults, rebukes and remarks made by the husband and without evidence on the record with respect to the conduct of the husband in response to which the wife behaved in a particular way on each occasion, it is difficult, if not impossible to draw inferences against the wife."

We find this approach difficult to accept. Under section 103 of the Code of Civil Procedure, the High Court may, if the evidence on the record is sufficient, determine any issue of 'fact necessary for the disposal of the appeal which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100. But, if the High Court takes upon itself the duty to determine an issue of fact its power to appreciate evidence would be subject to the same restraining conditions to which the power of any court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating ,evidence, inferences may and have to be drawn but courts of facts have to remind themselves of the line that divides an inference from guesswork.

If it is proved, as the High Court thought it was, that the respondent had uttered words of abuse and insult, the High Court was entitled to infer that she had acted in retaliation, provided of course there was evidence, direct or circumstantial, to justify such an inference. But the High Court itself felt that there was no evidence on the record with regard to the conduct of the husband in response to which the wife could be said to have behaved in the particular manner. The High Court reacted to this situation by saying that since there was no evidence regarding the conduct of the husband, "it is difficult, if not impossible, to draw inferences against the wife". If there was no evidence that the husband had provoked the wife's utterances, no inference could be drawn against the husband.

There was no question of drawing any inferences against the wife because, according to the High Court, it was established on the evidence that she had uttered the particular words of abuse and insult. The approach of the High Court is thus erroneous and its findings are vitiated. We would have normally remanded the matter to the High Court for a fresh consideration of the evidence but this proceeding has been pending for 13 years and we thought that rather than delay the decision any further, we should undertake for ourselves the task which the High Court thought it should undertake under section 103 of the Code. That makes it necessary to consider the evidence in the case.

But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of Proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it., This principle accords with commonsense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10 (1) (b) of the Act.

But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order Lo judge whether the burden has been discharged ?

The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact issaid to be proved when the court either believes it to exist or considersits existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the

supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2).

But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of robabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so' nicely balanced that a reasonable, (1) Per Dixon,J.in Wright v.Wright (1948)77 C.L.R.191at p. 210. (2) Blyth v. Blyth, [1966] 1 A.E.R. 524 at 536. not a vascillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To mar' or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender.]But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth(P), the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case; like any civil case, may be proved by a preponderance of probability". The High Court of Austraila in Wright v. Wright (2) , has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore

in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation.

Then, as regards the meaning of "Cruelty". The High Court on this question begins with the decision in Moonshee Bazloor Rubeem v. Shamsoonnissa Begum(3), where the Privy Council observed:

> *"The Mohomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own of which one of the most recent exposition is the following :- 'There must be actual violence (1) [1966] A.E.R. 524 at 536. (2) 1948, 77 C.L.R. 191 at 210. (3) 11 Moore's Indian Appeals 551. of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it'."*

The High Court then refers to the decisions of some of the Indian Courts to illustrate "The march of the Indian Courts with the Englishs Courts" and cites the following passage from D. Tolstoy's "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Ed., p. 61):

> *"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."*

The High Court concludes that "Having regard to these principles and the entire evidence in the case, in my judgment, I find that none of the acts complained of against the respondent can he considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law."

An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

> *"10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-*
>
> *(b) has treated the petitioner with such cruelty as to cause areasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"*

The inquiry therefore has to be whether the conduct charged a,.- cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent.

It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. The risk of relying on English decisions in this field may be shown by the learned Judge's reference to a passage from Tolstoy (p. 63) in which the learned author, citing Horton v. Horton(1), says :

> *"Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health." (1) [1940] P. 187.*

If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under section 10(1) (b), harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.

One other matter which needs to be clarified is that though under section 10(1) (b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Some one may want to keep late hours to finish the day's work and some one may want to get up early for a morning round of golf. The court cannot apply to the habits or hobbies of these the test whether a reasonable man situated similarly will behave in a similar fashion. "The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse,. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."(1) The Court has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins (2).

> *"In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make bout them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."*

We must therefore try and understand this Dr. Dastane and his wife Sucheta as nature has made them and as they have shaped their lives.

(1) American Jurisprudence, 2nd Ed., Vol. 24, p. 206.

(2) [1963] 2 A.E.R. 966,970.

The only rider is the interdict of section 23 (1) (a) of the Act that the relief prayed for can be decreed only if the court is satisfied that the petitioner is not in any way taking advantage of his own wrong. Not otherwise. We do not propose to spend time on the trifles of their married life. Numerous incidents have been cited by the appellant as constituting cruelty but the simple trivialities which can truly be described as the reasonable, wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each

party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas.

The spouses parted company on February 27, 1961, the appellant filed his petition on February 19, 1962 and the trial began in September, 1964. The 3-1/2 years' separation must naturally have created many more misunderstandings and further embitterment. In such an atmosphere, truth is a common casualty and therefore we consider it safer not to accept the bare word of the appellant either as to what the respondent said or did or as to the genesis of some of the more serious incidents. The evidence of the respondent too would be open to the same criticism but the explanation of her words and deeds, particularly of what she put in cold print, must come from her oral word and that has to be examined with care.

The married life of these spouses is well-documented, almost incredibly documented. They have reduced to writing what crossed their minds and the letters which they have written to each other bear evidence of the pass to which the marriage had come. Some of these were habitually written as the first thing in the morning like a morning cup (if tea while some were written in the silence of mid-night soon after the echo of harsh words had died down. To think that this young couple could indulge in such an orgy of furious letter-writing is to have to deal with a problem out of the ordinary for it is seldom that a husband and wife, while sharing a common home, adopt the written word as a means of expression or communication.

The bulk of the correspondence is by the wife who seems to have a flair for letter-writing. She writes in some style and as true as "The style is the man", her letters furnish a clue to her personality. They are a queer mixture of confessions and opprobrious accusations. It is strange that almost every one connected with this couple his a penchant for writing. The wife, apart from her voluminous letters, has written an autobiographical account of her unfortunate experiences in the Yeravada Hospital, calling it "Mee Antaralat Tarangat Asta" ("while I was floating in space").

The husband's father idealised the Shiva-Parvati relationship in a book called : "Gauriharachai Goad Kahani" ("The sweet story of Gaurihar"). Quite a few of the wifes relatives including a. younger sister of hers and of course her maternal uncle have set their pen to paper touching some aspect or the other of her married life. Perhaps, it was unfortunate that the promised millennium that did not come began with a letter. That was the letter of April 25, 1956 which the wife's lather wrote to the husband's father while the marriage negotiations were in progress. The marriage took place on May 13, 1956.

Nothing deserving any serious notice happened till August, 1959 except that the letters Exs. 556, 238, 243 and 244 show that quite frequently the respondent used to get into fits of temper and say things for which She would express regret later. In the letter Ex. 556 dated November 23, 1956 she admits to having behaved "very badly"; in Ek. 238 dated March 26, 1959 she admits that she was behaving like an "evil star" and had harassed the appellant; in Ex. 243 dated May 5, 1959 she says that she was aware of her "lack of sense" and asks for forgiveness for having insulted the appellant, his parents, his sister and her husband; and in Ex. 244 dated May 22, 1959 she entreats the appellant that he should not feel guilty for the insults hurled by her at his parents.

The period from August 1959 to March 1960 was quite critical and the correspondence covering that period shows that an innate lack of self-control had driven the respondent to inexorable conduct. By the letter. Ex. 256 dated February 16, 1960 the appellant complained to the respondent's father who

was then in Indonesia that the respondent kept on abusing him, his parent and sister and that he was extremely unhappy. The appellant says in the letter that differences between a husband and wife were understandable but that it was impossible to tolerate the respondent constantly accusing him and his relatives of wickedness. The appellant complains that the respondent used to say that the book written by his father should be burnt to ashes, that the appellant should apply the ashes to his forehead, that the whole Dastane family was utterly mean and that she wished that his family may be utterly ruined. The appellant was gravely hurt at the respondent's allegation that his father's 'Sanad' bad been once forfeited. The appellant tells the respondent's father that if he so desired he could ask her whether anything stated in the letter was untrue and that he had conveyed to her what be was stating in the letter. It may be stated that the respondent admits that the appellant had shown her this letter before it was posted to her father. On March 21. 1960 the respondent wrote a letter (Ex. 519) to the appellant's parents admitting the truth of the allegations made by the appellant in Ex. 256.

On June 23, 1960 the respondent made a noting in her own hand stating that she had accused the appellant of being a person with a beggarly luck, that she had said that the food eaten at his house, instead of being digested would cause worms in the stomach and that she had given a threat :

"murder shall be avenged with murder".

During June 1, 1960 to December 15, 1960 the marital relations were subjected to a stress and strain which ultimately wrecked the marriage. In about September, 1960 the appellants father probably offered to mediate and asked the appellant and the respondent to submit to him their respective complaints in writing. The appellant's bill of complaints is at Ex. 426 dated October 23, 1960. The letter much too long to be reproduced, contains a sorry tale. The gist of the more important of the appellant's grievances in regard to the period prior to June, 1960 is this : (1)' The respondent used to describe the appellant's mother as a boorish woman; (2) On the day of 'Paksha' (the day oil which oblations are offered to ancestors) she used to abuse the ancestors of the appellant; (3) She tore off the 'Mangal- Sutra'; (4) She beat the daughter Shubha while she was running a high temperature of 104'; (5) One night she started behaving as if she was 'possessed'. She tore off the Mangal-Sutra once again and said that she will not put it on again; and (6) She used to switch on the light at midnight and sit by the husband's bedside nagging him through the night, as a result he literally prostrated himself before her on several occasions.

The gist of the incidents from May to October, 1960 which the appellant describes as 'a period of utmost misery' is this. (1) The respondent would indulge in every sort of harassment and would blurt out anything that came to her mind; (2) One day while a student of the appellant called Godse was sitting in the outer room she shouted :

"You are not a man at all"; (3) In the heat of anger she used to say that she would pour kerosene on her body and would set fire to herself and the house; (4) She used to lock out the appellant when he was due to return from the office. On four or five occasions he had to go back to the office without taking any food; (5) For the sheer sake of harassing him she would hide his shoes, watch, keys and other things.

The letter Ex. 426 concludes by saying : , "She is a hard headed, arrogant, merciless, thoughtless, unbalanced girl devoid of sense of duty. Her ideas about a husband are : He is a dog tied at doorstep who is supposed to come and go at her beck and call whenever ordered. She behaves with the relatives of her husband as if they were her servants. When I see her besides herself with fury, I feel afraid that

she may kill me at any moment. I have become weary of her nature of beating the daughters, scolding and managing me every night uttering abuses and insults."

Most of these incidents are otherwise, supported, some by the admissions of the respondent herself, and for their proof we do not have to accept the bare word of the appellant.

On July 18, 1960 the respondent wrote a letter (Ex. 274) to the appellant admitting that within the bearing of a visitor she had beaten the daughter Shubha severely. When the appellant protested she retorted that if it was a matter of his prestige, be should not have procreated the children.

She has also admitted in this letter that in relation to her daughters she bad said that there will be world deluge because of the birth of those "ghosts". On or about July 20. 1960 she wrote another letter (Ex. 275) to the appellant admitting that she had described him as "a monster in a human body", that she had and that be'should not have procreated children. that he should "Pickle them and preserve them in a jar" and that she had given a threat that she would see to it that he loses his job and then she would publish the news in the Poona newspapers. On December 15, 1960 the appellant wrote a letter (Ex. 285) to the respondent's father complaining of the strange and cruel behaviour not only of the respondent but of her mother. He says that the respondent's mother used to threaten him that since she was the wife of an Under Secretary she knew many important persons and could get him dismissed from service, that she used to pry into his correspondence in his absence and that she even went to the length of saying that the respondent ought to care more for her parents because she could easily get another husband but not another pair of parents.

The respondent then went to Poona for the appellant's brother's marriage, where she was examined by Dr. Seth of the Yeravada Hospital and the spouses parted company on February 27, 1961.

The correspondence subsequent to February 27, 1961 shall have to be considered later in a different,, though a highly important, context. Some of those letters clearly bear the stamp of being written under legal advice. The parties had fallen out for good and the domestic war having ended inconclusively they were evidently preparing ground for a legal battle.

In regard to the conduct of the respondent as reflected in her admissions, two contentions raised on her behalf must be considered. It is urged in the first place that the various letters containing admissions were written by her under coercion. There is no substance in this contention. In her written statement, the respondent alleged that the appellant's parents had coerced her into writing the letters. At the trial she shifted her ground and said that the coercion proceeded from the appellant himself. That apart, at a time when the marriage had gone asunder and the respondent sent to the appellant formal letters resembling a lawyer's notice, some of them by registered post, no allegation was made that the appellant or his parents had obtained written admissions from her. Attention may be drawn in this behalf to the letters Exs. 299 and 314 dated March 23 and May 6, 1961 or to the elaborate complaint Ex. 318 dated May 19, 1961 which she made to the Secretary to Government of India, Ministry of Food and Agriculture.

Prior to that on September 23, 1960 she had drawn up a list of her complaints (Ex. 424) which begins by saying : "He has oppressed me in numerous ways like the following." But she does not speak therein of any admission or writing having been obtained from her. Further, letters like Exs. 271 and 272 dated respectively June 23 and July 10, 1960 which besides containing admissions on her part also contain allegations against the appellant could certainly not have been obtained by coercion. Finally, considering that the respondent was always surrounded by a group of relatives who had assumed

the role of marriage-counsellors, it is unlikely that any attempt to coerce her into making admissions would have been allowed to escape unrecorded. After all, the group here consists of greedy letter-writers.

The second contention regarding the admissions of the respondent is founded on the provisions of section 23(1)(a) of the Act under which the court cannot decree relief unless it is satisfied that "the petitioner is not in any way taking advantage of his own wrong'. The fulfilment of the conditions mentioned in, section 23(1) is so imperative that the legislature has taken the care to provide that "then, and in such a case, but not otherwise, the court shall decree such relief accordingly". It is urged that the appellant is a bigoted and egocentric person who demanded of his wife an impossibly rigid standard of behaviour and the wife's conduct must be excused as being in selfdefence. In other words, the husband is said to have provoked the wife to say and act the way she did and he cannot be permitted to take advantage of his own wrong. The appellant, it is true, seems a stickler for domestic discipline and these so-called perfectionists can be quite difficult to live with. On September 22, 1957 the respondent made a memorandum (Ex. 379) of the instructions given by the appellant, which makes interesting reading:

"Special instructions given by my husband.

(1) On rising up in the morning, to look in the minor.

(2) Not to fill milk vessel or tea cup to the brim.

(3) Not to serve meals in brass plates cups and vessels.

(4) To preserve carefully the letters received and if addresses of anybody are given therein to note down the same in the note book of addresses.

(5) After serving the first course during meals, not to repeatedly ask 'what do you want?' but to inform at the beginning of the meals how much and which are the courses.

(6) As far as possible not to dip the fingers in any utensils.

(7) Not to do any work with one hand.

(8) To keep Chi. Shuba six feet away from the primus stove and Shegari.

(9) To regularly apply to her 'Kajal' and give her tomato juice, Dodascloin etc. To make her do physical exercise, to take her for a walk and not to lose temper with her for a year.

(10) To give him his musts and the things he requires when he starts to go outside.

(11) Not to talk much.

(12) Not to finish work somehow or the other; for example to write letters in good hand writing, to take a good paper, to write straight and legibly in a line.

(13) Not to make exaggerations in letters.

(14) To show imagination in every work. Not to note down the milk purchased on the calendar."

Now, this was utterly tactless but one cannot say that it called for any attack in self-defence. The appellant was then 28 and the respondent 22 years of age. In that early morning flush of the marriage' young men and women do entertain lavish expectations of each other do not and as years roll by they see the folly of. their ways. But we think that the wife was really offended by the instructions given by

the appellant. The plea of self-defence seems a clear after-thought which took birth when there was a fundamental failure of faith and understanding.

Reliance was then placed on certain letters to show that the husband wanted to assert his will at any cost, leaving the wife no option but to retaliate. We see no substance in this grievance either. The, plea in the written statement is one of the denial of conduct alleged and not of provocation. Secondly, there are letters on the record by which the wife and her relatives had from time to time complimented the husband and his parents for their warmth, patience and understanding.

Counsel for the respondent laid great emphasis on the letter, Ex. 244 dated May 22, 1959 written by her to the appellant in which she refers to some "unutterable question" put by him to her. It is urged that the appellant was pestering her with a demand for divorce and the "unutterable question" was the one by which he asked for divorce. No such inference can in our opinion be raised. The respondent has not produced the letter to which Ex. 244 is reply; in the written statement there is hardly a suggestion that the appellant was asking her for a divorce; and the appellant was not asked in his evidence any explanation in regard to the "unutterable question".

These defences to the charge of cruelty must accordingly be rejected. However, learned counsel for the respondent is right in stressing the warning given by Denning L.J., in Kaslefsky v. Kaslefsky that : "If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread especially in undefended cases. The temptation must be resisted test we slip into a state of affairs where the institution of marriage itself is imperilled." But we think that t1o hold in this case that the wife's conduct does not amount to cruelty is to close for ever the door of cruelty so as to totally prevent any access thereto. This is not a case of mere austerity of temper, petulance of manners, rudeness of language or a want of civil attention to the needs of the husband and the household. Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner. But the respondent is the mercy of her inflexible temper. She delights in causing misery to her husband and his relation-, and she willingly suffers the calculated insults which her relatives hurled at him and his parents : the false accusation that, "the pleader's Sanad of that old bag of your father was forfeited"; "I want to see the ruination of the whole Dastane dynasty", "burn (1)[1950] 2 A.E.R. 398,403.

the book written by your father and apply the ashes to your forehead"; "you are not a man" conveying that the children were not his; "you are a monster in a human body. "I will make you lose your job and publish it in the Poona newspapers"-these and similar outbursts are not the ordinary wear and tear of married life but they became, by their regularity a menace to the peace and well-being of the household. Acts like the tearing of the Mangal-Sutra, locking out the husband when he is due to return from the office, rubbing chillie powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. Assuming that there was some justification for occasional sallies or show of temper, the pattern of behaviour which the respondent generally adopted was grossly excessive.

The conduct of the respondent clearly amounts to cruelty within the meaning of section 10(1) (b) of the Act. Under that provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end of her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in

newspapers and the, persistent abuses and insults hurled at the appellant and his parents are all of so grave an order as to imperil the appellant's sense of personal safety. mental, happiness, job satisfaction and reputation. Her once-too-frequent.

apologies do not reflect genuine contrition but were merely impromptu device to tide over a crisis temporarily. The next question for consideration is whether the appellant had at any time condoned the respondent's cruelty. Under section 23(1) (b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty".

The respondent did not take up the plea in her written statement that the appellant bad condoned her cruelty. Probably influenced by that omission, the trial court did not frame any issue on condonation. While granting a decree of judicial separation on the ground of cruelty, the learned Joint Civil Judge, Junior Division, Poona, did not address himself to the question of condonation. In appeal, the learned Extra Assistant Judge, Poona, having found that the conduct of the respondent did not amount to cruelty, the question of condonation did not arise. The High Court in Second Appeal confirmed the finding of the 1st Appellate Court on the issue of cruelty and it further held that in any case the alleged cruelty was condoned by the appellant.

The condonation, according to the High Court, consisted in the circumstance that the spouses co-habited till February 27, 1961 and a child was born to them in August, 1961.

Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of co-habitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of section 23(1) (b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration(1). The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued co-habitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws.

The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's Acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which

characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well magine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety.

> *"No matrimonial offence is erased by condonation. It is obscured but not obliterated" (1). Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence(2). Condoned cruelty can therefore be revived, say, by desertion or adultery."*

Section 23 (1) (b) of the Act, it may be urged, speaks of condonation but not of its revival and therefore the English doctrine of revival should not be imported into matters arising under the Act. Apparently, this argument may seem to receive some support from the circumstances that under the English law, until the passing of the Divorce Reform Act, 1969 which while abolishing the traditional bars to relief introduces defences in the nature of bars, at least one matrimonial offence, namely, adultery could not be revived if once condoned (3). But a closer examination of such an argument would reveal its weakness. The doctrine of condonation was established by the old ecclesiastical courts in Great Britain and was adopted by the English Courts from the canon law. 'Condonation' is a technical word which means and implies a conditional waiver of the right of the injured spouse to take matrimonial proceedings. It is not 'forgiveness' as commonly understood (4). In England condoned adultery could not be received because of the express provision contained in section 3 of the Matrimonial Causes Act, 1963 which was later incorporated into section 42(3) of the Matrimonial Causes Act, 1965. In the absence of any such provision in the Act governing the charge of cruelty, the word 'condonation' must receive the meaning which it has borne for centuries in the world of law(").

'Condonation' under section 23 (1) (b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.

(1) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., Vol I, p. 305, ("Condonation").

(2) See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061.

(3) See Rayden on Divorce, 11th Ed. (1971) pp. 11, 12, 23, 68, 2403.

(4) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., p. 306 and the Cases cited therein.

(5) See Ferrers vs Ferrers (1791) 1 Hag. Con 130 at pp. 130, 131.

It therefore becomes necessary to consider the appellant's argument that even on the assumption that the appellant had condoned the cruelty, the respondent by her subsequent conduct forfeited the conditional forgiveness, thereby reviving the original cause of action for judicial separation on the ground of cruelty. It is alleged that the respondent treated the appellant with cruelty during their brief meeting on March 19, 1961, that she refused to allow to the appellant any access to the children, that on May 19, 1961 she wrote a letter (Ex. 318) to the Secretary to the Government of India, Ministry of Food and Agriculture, New Delhi, containing false and malicious accusations against the appellant and his parents and that she deserted the appellant and asked the Government to provide her with separate maintenance.

These facts, if proved, shall have to be approached and evaluated differently from the facts which were alleged to constitute cruelty prior to its condonation. The incidents on which the appellant relied to establish the charge of cruelty had to be grave and weighty. And we found them to be so. In regard to the respondent's conduct subsequent to condonation, it is necessary to bear in mind that such conduct may not be enough by itself to found a decree for judicial separation and yet it may be enough to revive the condoned offence. For example, gross familiarities short of adultery(1) or desertion for less than the statutory period (2) may be enough to revive a condoned offence. The incident of March 19, 1961 is too trifling to deserve any notice. That incident is described by the appellant himself in the complaint (Ex. 295) which he made to the police on March 20, 1961. He says therein that on the 19th morning, the respondent went to his house with some relatives, that those relatives-instigated her against him, that they entered his house though he asked them not to do so and that she took away certain household articles with her. As shown by her letter (Ex. 294) dated the 19th itself, the articles which she took away were some petty odds and ends like a do]], a slate, a baby hold-all, two pillows, a bundle of clothes and a baby-cart. The police complaint made by the appellant betrays some hypersensitivity.

As regards the children, it does seem that ever since February 27, the appellant was denied a chance to meet them. His letters Exs. 307. 309 and 342 dated April 20, April 21 and November 23, 1961 respectively contain the grievance that the children were deliberately not allowed to see him., From his point of view the grievance could be real but then the children, Shubha and Vibha, were just 4 and 2 years of age in February, 1961 when their parents parted company.

Children of such tender age need a great amount of looking after and they could not have been sent to meet their father unescorted. The one person who could so escort them was the mother who bad left or bad to leave the matrimonial home for good. The appellant's going to the house of the respondent's parents where he was living was in the circumstances an impracticable proposition. Thus, the wall that divided the parents denied to the appellant access to his children.

(1) Halsbury's Law-, of England, 3rd Ed., Vol. 12, p. 306, para 609.

(2) Beard vs. Beard [1945] 2 A.E.R. 306.

The allegations made by the respondent in her letter to the Government, Ex. 318 dated May 19, 1961 require a close consideration. It is a long letter, quite an epistle, in tune with the, respondent's proclivity as a letter-writer. By that letter, she asked the Government to provide separate maintenance for herself

and the children. The allegations contained in the letter to which the appellant's counsel has taken strong exception are these : (1) During the period that she lived with the appellant, she was subjected to great harassment as well as mental and physical torture; (2) The appellant had driven her out of the house on February 27, 1961; (3) The appellant had deserted her and had declared that he will not have any connection with her and that he will not render any financial help for the maintenance of herself and the children. He also refused to give medical help to her in her advanced stage of pregnancy; (4) The appellant had denied to her even the barest necessities of life like food and clothing; (5) The parents of (he appellant were wicked persons and much of her suffering was due to the influence which they had on the appellant; (6) The appellant used to threaten her that he would divorce her, drive her out of the house and even do away with her life, (7) The plan to get her examined by Dr. Seth of the Peravada Mental Hospital was an insincere wicked and evil move engineered by the appellant, his brother and his father, (8) On her refusal to submit to the medical examination any further, she was driven out of the house with the children after being deprived of the valuables on her person and in her possession; and (9) The appellant had subjected her to such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.

Viewed in isolation, these allegations present a different and a somewhat distorted picture. For their proper assessment and understanding, it is necessary to consider the context in which those allegations came to be made. We will, for that purpose, refer to a few letters.

On March 7, 1961 the respondent's mother's aunt, Mrs. Gokhale wrote a letter (Ex. 644) to the respondent's mother. The letter has some bearing on the events which happened in the wake of the separation which took place on February 27, 1961. It shows that the grievance of the respondent and her relatives was not so much that a psychiatrist was consulted as that the consultation was arranged without any prior intimation to the respondent. The letter shows that the appellant's brother Dr. Lohokare, and his brother-in-law Deolalkar, expressed regret that the respondent should have been got examined by a psychiatrist without previous intimation to any of her relatives. The letter speaks of a possible compromise between the husband and wife and it sets out the terms which the respondent's relatives wanted to place before the appellant. The terms were that the respondent would stay at her parents' place until her delivery but she would visit the appellant off and on; that the children would be free to visit the appellant; and that in case the appellant desired that the respondent should live with him, he should arrange that Dr. Lohokare's mother should stay with them in Delhi for a few days. The last term of the proposed compromise Was that instead of digging the past the husband and wife should live in peace and happiness. The letter bears mostly the handwritting of the respondent herself and the significance of that circumstance is that it was evidently written with her knowledge and consent. Two things are clear from the letter : one, that the respondent did not want to leave the appellant and two, that she did not either want to prevent the children from seeing the appellant. The letter was written by one close relative of the respondent to another in the ordinary course of events and was not, so to say, prepared in order to create evidence or to supply a possible defence. It reflects a genuine attitude, not a make believe pose and the feelings expressed therein were shared by the, respondent whose handwriting the letter bears.

This letter must be read along with the letter Ex. 304 which the respondent sent to the appellant on April 18, 1961. She writes :

> *"I was sorry to hear that you are unwell and need treatment. I would always like never to fail in my wifely duty of looking after you, particularly when you are ailing, but you will, no doubt, agree that even for this, it will not be possible for me to join you in the*

house out of which you have turned me at your father's instance. 'This is, therefore, just to keep you informed that if you come to 7/6 East Patel Nagar, I shall be able to nurse you properly and my parents will ever be most willing to afford the necessary facilities under their care to let me carry out this proposal of mine."

There is no question that the respondent had no animus to desert the appellant and as stated by her or on her behalf more than once, the appellant had on February 27, 1961 reached her to Mrs. Gokhale's house in Poona, may be in the hope that she will cooperate with Dr. Seth in the psychiatric exploration. She did not leave the house of her own volition.

But the appellant had worked himself up to believe that the respondent had gone off her mind. On March 15, 1961 he made a complaint (Ex. 292) to the Delhi Police which begins with the recital that the respondent was in the Mental Hospital before marriage and that she needed treatment from a psychiatrist. He did say that the respondent was "a very loving and affectionate person" but he qualified it by saying : "when excited, she appears to be a very dangerous woman, with confused thinking".

On April 20, 1961 the appellant wrote a letter (Ex. 305) to the respondent charging her once again of being in an "unsound state of mind". The appellant declared by that letter that he will not be liable for any expenses incurred by her during her stay in her parents' house. On the same date he wrote a letter (Ex. 307) to the respondent's father reminding him that he, the appellant, had accepted a girl "who had returned from the Mental Hospital". On April 21, 1961 he wrote it letter (Ex. 309) to the Director of Social Welfare, Delhi Administration, in which he took especial care to declare that the respondent "was in the Poona Mental Hospital as a lunatic before the marriage". The relevance of these reiterations regarding the so-called insanity of the respondent, particularly in the last letter, seems only this, that the appellant was preparing ground for a decree of divorce or of annulment of marriage. He was surely not so naive as to believe that the Director of Social Welfare could arrange to "give complete physical and mental rest" to the respondent. Obviously, the appellant was anxious to disseminate the information as widely as possible that the respondent was of unsound mind.

On May 6, 1961 the respondent sent a reply (Ex. 314) to the appellant's letter, Ex. 305, dated April 20, 1961. She expressed her willingness to go back to Poona as desired by him, if he could make satisfactory arrangements for her stay there. But she asserted that as a wife she was entitled to live with him and there was no purpose in her living at Poona "so many miles away from Delhi, without your shelter". In regard to the appellant's resolve that he will not bear the expenses incurred by her, she stated that not a pie remitted by him will be illspent and that, whatever amount he would send her will be, accounted for fully. It is in this background that on May 19, 1961 the respondent wrote the letter Ex. 318 to the Government. When asked by the Government to offer his explanation, the appellant by his reply Ex. 323 dated July 19, 1961 stated that the respondent needed mental treatment, that she may have written the letter Ex. 318 in a "madman's frenzy" and that her father had "demoralised" her. In his letter Ex. 342 dated November 23 , 1961 to the respondent's father, he described the respondent as "'your schizophrenic daughter".

Considered in this context, the allegations made by the respondent in her letter Ex. 318 cannot revive the original cause of action. These allegations were provoked by the appellant by his persistent and purposeful accusation, repeated times without number, that the respondent was of unsound mind. He snatched every chance and wasted no opportunity to describe her as a mad woman which, for the purposes of this appeal, we must assume to be wrong and unfounded. He has been denied leave to

appeal to this Court from the finding of the High Court that his allegation that the respondent was of unsound mind is baseless. He also protested that he was not liable to maintain the respondent.

It is difficult in these circumstances to accept the appellant's argument either that the respondent deserted him or that she treated him with cruelty after her earlier conduct was condoned by him. It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival(1) and in cases of cruelty, "very slight fresh evidence is needed to show a resumption of the cruelty. for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out". But the conduct of the respondent after condonation cannot be viewed apart from the conduct of the appellant after condonation. Condonation is conditional forgiveness but the grant of such forgiveness does not give

(1) Cooper vs. Cooper (1950) W.N. 200 (H.L.)

(2) Per Scott L. J. in Batram vs. Batram (1944) p. 59 at p. 60.

to the condoning spouse a charter to malign the other spouse. If this were so, the condoned spouse would be required mutely to submit to the cruelty of the other spouse without relief or remedy. The respondent ought not to have described the appellant's parents as "wicked" but that perhaps is the only allegation in the letter Ex. 318 to which exception may be taken. We find ourselves unable to rely on that solitary circumstance to allow the revival of condoned cruelty.

We therefore hold that the respondent was guilty of cruelty but the appellant condoned it and the subsequent conduct of the respondent is not such as to amount to a revival of the original cause of action. Accordingly, we dismiss the appeal and direct the appellant to pay the costs of the respondent.

Appeal dismissed.

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LACHMAN UTAMCHAND KIRIPLANI VS MEENA ALIAS MOTA

Equivalent citations: 1964 AIR 40, 1964 SCR (4) 331
DATE OF JUDGMENT: 14/08/1963

AIR 1964 SC 40

Lachman Utamchand Kiriplani
Vs.
Meena alias Mota

(Before Hon'ble Mr. Justice Bhuvneshwar P. Sinha, CJ. Hon'ble Mr. Justice Sudhi Ranjan Das, Hon'ble Mr. Justice K. Subbarao, Hon'ble Mr. Justice Raghubar Dayal, Hon'ble Mr. Justice N. Rajagopala Ayyangar, JJ.)

Husband and wife-judicial separation-Desertion without just-cause-offer to return to matrimonial home must be shown to be bona fide-Petition for judicial separation-Burden of proof-Hindx Marriage Act, 1955 (25 of 1955), s. 10(1)(a).

Where an application is made under s. 10(1)(a) of the Hindu Marriage Act, 1955, for a decree for judicial separation on the ground of desertion, the legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent intentionally forsook and abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not by his or her action by word or conduct provide a just cause to the other spouse to desist from, making any attempt at reconciliation or resuming cohabitation; -but where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse.

An offer to return to the matrimonial home after sometime, though desertion had started, if genuine and sincere and represented his or her true feelings and intention, would bring to an end the desertion because thereafter the animus deserendi would be' lacking, though the factum of separation might continue; but on the other hand, if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing.

In the present case, the evidence was clear that the respondent left her matrimonial home with the permission of her husband and his parents and that it was not possible to infer from the evidence given by Dr. Lulla that the respondent decided to abandon the appellant. The letters demonstrated beyond any reasonable doubt that the wife did not demonstrated beyond band with the requisite animus, but on the other hand, showed her willingness to go over to Bombay as soon as she regained her health. In view of the false allegations made by the appellant in his letter dated April 1, 1954, in which he charged the respondent with unchastity and leading a fast and reckless life, from that date the desertion, if any, on the part of the respondent came to an end and from that date the appellant was guilty of desertion.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 292 of 1961. Appeal from the judgment and decree dated July 16, 1959, of the Bombay High Court in Appeal from the Original Decree No. 802 of 1957.

J. C. Bhatt and N. N. Keswam, for the appellant.

C. B. Agarwala, C. M. Mehta and V. J. Merchant, for the respondent.

August 14, 1963. The Judgment of B. P. Sinha, C.J., S. K.Das, Raghubar Dayal and N. Rajagopala Ayyangar,JJ. was delivered by Ayyangar, J. Subba Rao, J. delivered a dissenting opinion.

AYYANGAR J.-This is an appeal against the judgment of the High Court of Bombay reversing the judgment and decree of the City Civil Court at Bombay by which a decree for judicial separation granted by' the trial judge was reversed and it comes before us on a certificate of fitness granted by the High Court under Art. 133(1) (c) of the Constitution. The appellant, the husband, filed a petition in the City Civil Court, Bombay, under s. 10(1) (a) of the Hindu Marriage Act, 1955 (which we shall hereafter refer to as the Act), praying for a decree against the respondent, his wife, for judicial separation on the ground that in terms of that provision she had "deserted" him for "a continuous period of not less than two years immediately preceding the presentation of his petition". The petition was presented on September 20, 1956, and the material allegation was that the wife had left the matrimonial home on February 26, 1954, and had not thereafter come back to him and that this constituted "desertion" within the meaning of the provision just cited. The learned trial Judge held that the appellant had established to the satisfaction of the Court that the respondent-wife had left the matrimonial home with the intention of permanently breaking it up and that such desertion continued during the requisite period of two years and in consequence granted the decree for judicial separation, as prayed for. The wife preferred an appeal, to the High Court and the learned judges disagreeing with the finding of the learned trial judge that the leaving, by the wife, of the matrimonial home was with the intention of deserting the appellant, reversed the decree of the trial judge and directed the dismissal of the appellant's petition with costs. It is the correctness of this reversal that is canvassed in the appeal before us.

Even at the outset we might state that the decision of the appeal does not depend so much on any substantial question of law but rather on an appreciation of the facts on two matters on the basis of which the learned Judges of the High Court have decided the case against the appellant: (1) whether the appellant had established that the respondent had an irrevocable determination to break up the matrimonial home when she admittedly left the petitioner on February 26, 1954, and did not return to him thereafter, it being common ground that the onus of proving this to the reasonable satisfaction of the Court was on the appellant, and (2) whether the respondent had a justifiable cause for not returning to the husband the existence of which prevented her admitted absence from the matrimonial home from constituting "desertion" as to serve as the foundation for an order for judicial separation under s. 10(1) (a) of the Act.

Before, however, dealing with these two points which from the crux of the matter in dispute in the appeal, it is necessary to summarise, briefly, the history of the married life of the parties. The parties are Sindhi Hindus of the: Bhai Bund community. The appellant is a practicing doctor while the respondent is said to have had read up to the High school classes. While the appellant's father and his family were people of but moderate means, the respondent's father was a very affluent business,Man-

his business spreading over almost the entire South .East Asia. He had business houses in Singapore, Dakarta, ,Hong Kong, Manila etc. Besides, while the appellant and his parents appear to have been of an orthodox and conservative outlook and bent of mind, the respondent and her parent's apparently did not set much store by orthodoxy, and were liberal and modern. It looks to us as if it is possible that the trouble between the spouses was in part at least due to these variations.

The parties were married at Hyderabad in Sind (now in Pakistan) on November 11, 1946. The appellant was living with his father and mother and his two sisters and after her marriage the respondent commenced to live with him in this household. The parties are not agreed as to whether their marital life was happy even to start with, for while it was the case of the husband that the same was unhappy even from the very beginning, the respondent's version was that for the first month or so her relationship with her husband was happy, but nothing much turns on this because from soon thereafter both of them agree in saying -that they were not pulling on well together. It is not necessary either to tract the source of the friction between the spouses or narrate the incidents which are related in connection therewith as they are hardly relevant for the decision of the real points arising in the appeal. The only other circumstance to be noted in connection with the early period of their married life was that on July 19, 1947, a son, Ashok, was born to the respondent who, it may be mentioned, is now living with the appellant.

It is common experience that in some cases, the birth of a child puts an end to minor misunderstandings and bickerings between the spouses, for the parties concentrate on lavishing in common their love on the child and thus the two are brought together but in the case on band, it does not seem to have had this effect and the relation between the parties does not appear to have been smoothened by Ashok's birth. With the partition of the sub-continent the parties migrated to India.

The appellant, his parents and his two sisters who were all living with him moved over to Bombay along with the respondent and their young child but apparent-

ly. the accommodation which they could 'then secure was pot sufficient for this large family, and as a result the appellant took the respondent, his child and his two sisters to Colombo and left them in the care of his maternal uncle, one Narian Das, to stay there till he could find a sufficiently commodius home in Bombay. The respondent stayed for a very short time at Colombo and though she admitted that she was treated with kindness and affection by this uncle, apparently all was not well in the relationship between the appellant's sisters and the respondent. What emerged out of this was that she left Colombo without informing either Narian Das or the appellant and came over to India. She came to Poona and Lonavala and started staying with her mother who was there. There is a complaint by the appellant against her leaving his uncle without informing him and on the other hand there is a complaint by the respondent about the way in which her sisters-in-law behaved towards tier ,but we pass over these incidents and the respective cases ,as, not having any material bearing on the points at issue in the appeal. The appellant having come to know of her ,arrival at Lonavala, it is common ground that he went there and induced her to come over and stay with him at ,Bombay. This was sometime towards the end of January, 1948.

The period from January, 1948, to 1954 might be dealt with together. During this period she was staying most of the time with the appellant at Bombay but his complaint is that she used to leave him very often and that pressure had to be exerted or inducements offered to get her back to Bombay to stay with him. This is, -of course, denied by the respondent whose story is that every time it was with his consent that she went and that she came back of her own accord. It is not, however, necessary

to decide which of these versions is correct, though the learned trial judge who had an opportunity of seeing these two as witnesses was inclined to accept the version of the husband in respect of any matter on which he, was contradicted by his wife. It is only necessary to add that though during these 4 or 5 years or so, the parties were living together most of the time the relations between them had not become normalised. Besides, it might be mentioned that the relationship between the parents of the two spouses were also strained and similarly the relationship between the appellant and his wife's parents as also between the respondent and her husbands parents.

We next come to a crucial event. On February 26, 1954, the respondent left the appellant's house at Bombay (Colaba) and went to Poona. She was taken from the house by her father who had come there in the evening and she traveled with him to poona by train. It is the case of the appellant that the respondent left his home with the main items of her jewellery and clothes without the knowledge and consent of himself and his parents and at a time when there was no one in the house except a maid-servant and that he came to know of the respondent's departure only from the maid-servant, when he later returned to the house. On the other hand, it is the case of the respondent that she left the house after permission had been obtained by her father from her fatherin-law and after she herself had obtained the permission of her husband and that at the time of the departure when her father came to take her, her father-in-law, mother-in-law and the appellant were all present in the house and that the jewels etc., were given to her by her mother-in-law who bade her good-bye and wished her a happy journey. The learned trial judge accepted the appellant's story that the respondent did not seek or obtain anyone's permission for quitting the house and that she left the house without the knowledge or consent 'of anyone. The materiality of the acceptance of the appellant's version stems from the fact that in order to 'constitute desertion the withdrawal of the deserting spouse from the matrimonial home should be without reasonable cause and "without the consent or against the wish of such party" [vide Explanation to s. 10(1) of the Act]. On the other hand, the learned Judges of the High Court were inclined to accept the wife's version that she had the consent of her husband to leave the home. For reasons we shall set out in its proper place we are in agreement with the learned trial Judge and do not share the views of the learned judges who accepted the wife's version of this event. We shall, however, revert to it after completing the narrative of the events leading up to the filing of the petition.

It is the case of the appellant that he came to know a few days after her leaving him that his wife was staying at Poona with her parents. According to his evidence he considered that, having regard to the manner in which his wife left him, no useful purpose would be served by any trip of his to Poona to persuade her to come back. It was his further case that a friend of his-one Dr. Lulla, an M.R.C.P. of London who was employed as a doctor in a hospital in a suburb of Bombay-suggested that the two of them go to Poona and try to induce the respondent to come back to Bombay. This proposal, he says, he accepted and the appellant as well as Dr. Lulla who has been. examined as a witness on his side have testified to the fact that in the last week of May, 1954, both of them went to Poona one evening, met the respondent at her parents' house and appealed to her to come back to Bombay to live with the appellant. According to the evidence of both these witnesses, the respondent, when requested to come back to Bombay, stated that she was determined never again to come back to her husband's house. The respondent denied the entire story and stated that neither the appellant nor Dr. Lulla ever came to Poona during her stay there, nor of course ever talked to her. The learned trial Judge who had the opportunity of seeing Dr. Lulla in the box entertained a very favorable opinion of his respectability and credibility and accepted in toto his evidence that the respondent intimated to him her fixed determination not to come back to the appellant. In the background of the previous history of the relationship between

the parties and the manner in which the respondent left, the husband's home on February 26, 1954, as found by the trial Judge, he recorded a finding that the factum of desertion which was not in dispute was accompanied by "'animus deserendi' which had been satisfactorily established by the declaration she made to the appellant and his friend. The learned Judges of the High Court were not disposed to differ from the learned trial judge as regards the reality of the visit to Poona of Dr. Lulla accompanied by the appellant and their meeting the respondent there. They were, however, not in-

clined to attach any value to Dr. Lulla's testimony as regards the statement made by the respondent because of two factors: (1) the time lag between May, 1954, when he met her and April, 1957, when he gave evidence; the learned judges were inclined to hold that the witness could not properly remember correctly the dialogue after that interval ; (2) the fact that Dr. Lulla could not reproduce verbatim the questions put to the respondent and the answers she gave was considered by them as a circumstance which would detract from the acceptability of, the evidence regarding the matters about which he deposed. For these reasons the learned Judges found that though Dr. Lulla might have visited the respondent in May, 1954, as spoken to by him, there was no proper proof before the Court that the respondent had given expression to a determination not to return to the husband. We shall deal later with this appreciation of Dr. Lulla's evidence and the weight to be attached to it, but, to continue the narrative, the respondent left India for Singapore on July 7, 1954, and returned from abroad in April, 1956. During this period there has been some correspondence between the parties by way of telegrams and letter which have considerable relevance on the issues involved in the case and the points in controversy between the parties.

Before, however, referring to the events of that period a few more incidents which happened prior to the departure of the respondent from India have to be noticed After Dr. Lulla's meeting the respondent at the end of May, 1954, the next event of some importance is that the respondent and her father came to Bombay during June, 1954, for the purpose of the respondent obtaining a passport to enable her to leave India. At that time, it is common ground, that the respondent stayed with her paternal uncle-one Tola Ram-whose house was in Colaba and about five minutes' walk from the appellant's residence. It is the case of the appellant that when the respondent and her father came over to Bombay in June they stayed there for about a month. This however, is denied by the respondent and her father who say that the duration of their stay at Bombay at Tola Ram's house was only for a little over a fortnight. It matters little which version is correct but one thing is clear that notwithstanding the admitted stay in Bombay for two weeks or more she never went to her husband's house either to see him or even to see her son, Ashok, then a boy of about 7 years. The learned Judges of the High Court have not adverted to this circumstance which we consider has material bearing in deciding between the rival versions as to whether the respondent did or did not leave the husband's home with his permission and consent and the blessings of the parents-in-law. It is also to be noticed, and about this there is no dispute, that in the application for the passport and in the passport itself it was not the appellant's name or address that was given as her Indian residential address but that of Tola Ram in Colaba. As stated earlier, the respondent left Bombay by air for abroad on . July 7, 1954. Before taking off she was in Bombay for nearly 24 hours before the plane's departure. It is not in dispute that even then, she did not visit her husband or her child though she was staying at Tola Ram's. From Bombay the respondent reached Singapore by air and it is admitted that she sent no intimation or information to the appellant either regarding her departure, the place to which she had gone or the proposed duration of her stay. The appellant having come to know through other sources of the respondent having gone to Singapore, sent her a cablegram on the 20th July reading :

"Extremely surprised at your suddenly secretly leaving India without my knowledge and consent. Return immediately first plane"..

to which the respondent replied also by a cablegram "Returning within a few months".

These telegrams would, at least, make one thing clear that the appellant's case that he had no knowledge of the respondent leaving India was not an after-thought and is probably true. On receipt of this telegram dated the 23rd July the appellant replied the next day "You must return immediately".

of course, the respondent did not return but her case was that she replied by a letter dated August 2, 1954. There is a controversy between the parties as to whether this letter was really written at all, or if written, was posted and to the proper address. It is, however, common ground, and found by both the Courts, that the appellant did not receive any letter from the respondent bearing that date or written at about that time or with the contents which according to her were the contents of that letter. The learned trial judge was inclined to the view that the respondent did write a letter on that date but he was not satisfied that the copy which she produced which has been marked as Ex. 4 in the case represented either a true copy of it or carried the contents of that letter. He, therefore, discarded Ex. 4 from consideration. The learned judges of the High Court on the other hand, took the view that a letter was written by the respondent on that date and they were prepared to accept her story that the original of that letter which was stated to be in manuscript-written in her own hand,. was copied from the typescript which she produced and which was marked as Ex. 4. The evidentiary value of that letter was stated to consist in its disclosure of the state of mind of the respondent and the learned judges held that its contents indicated the readiness and willingness on the part of the respondent to join her husband and therefore negatived any animus to desert or to continue the desertion, if there was any such intention originally on her part. We shall reserve the discussion of the evidentiary value of this letter to a later stage but shall here merely set out the material parts of it:

"I really feel surprised why you want me to return to Bombay by first plane without any reason.

Dear, I was particularly pained to read that I have suddenly and secretly left the place without your consent. What has prompted you to write this I really do not understand.

Dear, how comes this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I do not like to discuss here since You are fully aware. It was you who suggested that I should go over and stay at my father's place and at your suggestion I did so. You are fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent. As soon as I feel better I shall return to Bombay."

The appellant not having received this letter (if it was written) and not having received any reply to his cable dated July 24, 1954, asking the respondent to return immediately to India, was, according to him, hearing stones that she was moving from place to place. He thereupon' sent her a cablegram on February 24, 1955, and addressed it to both her Singapore and Djakarta addresses as he was not quite sure as to where exactly she was. That telegram read :

"Since your secret departure you not replying my telegrams, letters. Myself shocked. You wandering different countries leading reckless life spoiling my reputation. Your most disgraceful behaviour ruining my life." At the time the cable was received the respondent was still at Singapore and on the 26th she replied by cable :

"Your allegations in your cable dated 24th not correct. Cannot understand your attitude. I have departed with your knowledge with my father because of ailing health due to reasons you are well

aware. Keeping quiet life with my parents. Have not received your letter ; only telegrams which have been replied by cable and letter."

and to this the appellant replied also by cable:

"Your telegram dated 26th February contains all foul lies. Myself shocked at your fabricating false stories to justify your secretly quitting home and flouting my repeated instructions."

But even before the receipt of this last cable from the appellant the respondent wrote to him a letter from Singapore dated March 3 in which, after setting out the text of the cablegrams exchanged, she made a positive assertion that she wrote a, letter to him on August 2, 1954. The rest of the letter was concerned with inviting him to come abroad and stay with her and her father at Hong Kong to which place she said she was leaving the next day and she promised him real pleasure if he stopped working for his parents and commenced having pleasure with the respondent in her father's house. After the dispatch of this letter on the 3rd of March the respondent received the appellants cable in which he reiterated his allegation that she had left his house secretly and without his knowledge and was thereafter flouting his instructions., On March 10, 1955, she sent him a cable from Hong Kong refuting this allegation and adverting to the invitation' contained in her letter dated March 3, 1955, she, said.

"Why don't you come out of Bombay house-hold atmosphere and see for yourself. Cannot understand, what you mean by flouting repeated instructions."

The letter of the 3rd was dispatched by the respondent by registered post and when this was received as well as the cables from the respondent, the appellant wrote in reply a letter sent by registered post dated April 1, 1955, in which he passed severe strictures against her conduct and in her continuing abroad without obeying his instructions. We shall have to deal in somewhat great detail with the contents of this letter. Ordinarily read it might seem to indicate that the appellant was charging the respondent with improper behaviour even amounting to sexual immorality. While in the witness box the appellant specifically repudiated that he intended any Such imputation and, in fact, made it clear that he was neither basing his petition on any allegation of immorality nor that he ever intended to impute any such conduct to her. The learned trial judge accepted this explanation of the appellant and interpreted the letter as the outpourings of an angry and grieved husband and was not, therefore, inclined to read the expressions used therein as imputing unchastity to her. On the other hand, the learned judges of the High Court analysed the text of the letter and considered that it clearly made false and unfounded imputations of unchastity on the respondent and for that reason they held that even if the respondent be held to have had an animus deserendi when she quitted her husband's home on February 26, 1954, and continued to retain that animus, still having regard to the false and malicious amputations of unchastity made by the appellant in his letter dated April 1, 1955, they held that she had justifiable cause for not returning to him thereafter and this formed one of the prime grounds for directing the dismissal of the appellant's petition for judicial separations We shall have to discuss these conflicting views and the different -interpretations of this letter, in the light of the evidence adduced in the case when dealing with it. We shall, however, pass this over for the present and continue the narrative.

The respondent received this letter while she was still at Hong Kong. But the next day she left for Manila and she replied from the latter place on April 12, 1955. The main points made in this reply were : (1) She left the house of the appellant with the consent of himself and his parents, (2) The reason for her leaving Bombay to stay with her parents was that her health was poor and -she wanted to recoup it

by a trip abroad. The stay abroad was therefore only for the improvement of her health., (3) The reason for her vacationing with her parents being for the improvement of her health and for no other-not for leading the gay life which was suggested in the appellant's letter dated April 1, 1955. She added :

"As soon as my health has completely improved I shall, of course, come back to you and to our son." This, was the end of the correspondence between the parties. It is common ground that she did not inform the appellant as to when she would be returning to India which was in April, 1956. Nor did she inform the appellant after her arrival in the country, nor did she go to his home-Bombay-to meet him or her son. just about the time some relations of the respondent were vacationing for the summer in Kashmir and she accompanied them there and spent the summer in the valley. No communications passed between the appellant and the respondent during this period either. It was after this that the petitioner filed the petition out of which this appeal arises, on September 20, 1956. After the respondent was served with notice of the petition some attempt was made to effect a reconciliation but it is not necessary to notice this because if there had been desertion, as required by law and the duration of that desertion amounted to two years, the terms of s. 10(1) of the Act are satisfied and the fact that thereafter the guilty spouse repents or recants is not by itself a ground for refusing the relief to which the injured spouse is entitled (Compare s. 23(1) of the Act). From the above narration it will be seen that there are three points of contested fact on which the decision 2 3 -2 S. C. India/61 of this appeal would turn : (1) whether the respondent left the appellant's home on February 26, 1954, with his consent or whether she did so without such consent., (2) What was the intention or animus of the respondent-in leaving her matrimonial home, and in regard to this the interview with Dr. Lulla and the other matters to which we have referred earlier and which transpired before the respondent left India on July 7, 1954, would have relevance., (3) The proper interpretation of the letter of April 1, 1955, writ-ten by the appellant to the respondent and whether in the circumstances of the case it would afford legal justification for the respondent's refusal thereafter to return to the matrimonial home, and to these questions we shall immediately address ourselves.

Before doing so, however, it might be convenient to refer briefly to the law on the topic. The relevant statutory provision may first be set out. Reading only the portion that is material s. 10(1)enacts "10. (1) Either party to a marriage whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition ; or"

This sub-section is followed by an Explanation which runs :

"Explanation.-In this section, the expression 'desertion', with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage."

The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal from Bombay where the. Court had to consider the provisions of s. 3(1) of the Bombay Hindu Divorce Act, 1947, whose language is in pari material with that of s.

10(1) of the Act. In the judgment of this Court in Bipin Chander v. Prabhawati[1] there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion

1 [1956] S.C.R. 838.

were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.), Vol. 12, was cited with approval :

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. The position was thus further explained by this Court:

"If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.....

Desertion is a matter of inference to be drawn from the facts 'and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference ; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact there has been a separation, the essential question always is whether that act could be attributable to an animus descrendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may havecommenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time."

Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled law that the burden of proving desertion-the "factum" as well as the "animus deserenai is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

As Denning, L.J., observed : (Dunn v. Dunn)[2] : "The burden he (Counsel for the husband) said was on her to prove just cause (for living apart). The argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to' distinguish between a legal burden of proof laid down by law and a provisional burden raised by the state of the evidence..... The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves that fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has

2 [1948] 2 All. E.R. 822, 823.

the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

This, in our opinion, is as well the law in this country under the Act.

The other matter is this. Once desertion, as defined earlier, is established there is no obligation on the deserted husband (taking the case where he is the deserted spouse) to appeal to the deserting spouse to change her mind, and the circumstance that the deserted husband makes no effort to take steps to effect a reconciliation with the wife does not debar him from obtaining the relief of judicial separation, for once desertion is proved the deserting spouse, so long as she evinces no sincere intention to effect a reconciliation and return to the matrimonial home, is presumed to continue in desertion. of course, the matter would wear a different complexion and different considerations would arise where before the end of the statutory period of 2 years or even thereafter before the filing of the petition for judicial separation the conduct of the deserted spouse was such as to make the deserting spouse desist from making any attempt at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that the desertion was without just cause during the entire period referred to in s. 10(1)(a) of the Act: before he can succeed.

There were a few submissions made to us by learned counsel for the appellant regarding the nature of the "just cause", particularly whether this should amount to "cruelty" or other matrimonial offence etc., based on a construction of certain other provisions of the Act, but as these have no substance and were not persisted in, we consider it unnecessary even to refer to them.

We shall now proceed to consider the facts in the light of these principles with a view to find out whether the appellant has proved that the respondent had deserted him without just cause for the requisite period. We start with the admitted circumstance that the respondent left the husband's home on February 26, 1954. It was not suggested that the husband threw her out or that she left because of any expulsive conduct on his part. There is therefore no suggestion or case that she left for any justifiable cause. The next question that would fall for determination is whether she left with his consent. As we have stated earlier, on this point the learned judges of the High Court have recorded a finding different from that of the trial Judge. The case of the respondent was that she had the consent of her parents-in-law and also of the husband, and she even went to the length of suggesting that it was he who suggested that she might go abroad with her father in order to improve her health. Now as to the obtaining the consent of the respondent's parents-in-law, the evidence was this. The respondents father who was her second witness deposed as follows: There had always been disinclination on the part of the appellant and his parents in permitting the respondent to go over to her parents' place on most earlier occasions. When permission was thus sought for such a purpose, there had always been friction and trouble. In connection with his taking his daughter with him when he intended to leave India in July, 1954 he sought their permission on more than two occasions but the same was refused.

Subsequently a friend and a neighbour of his at Poona--one Maganmalpromised to intercede with the appellants father. The latter spoke to the appellant's father and obtained permission and informed the witness.

The entire story of Maganmal having spoken to appellant's father and obtained the latter's permission was denied by the appellant as false and the learned trial Judge was not inclined to believe the story as true. Maganmal who gave evidence as D.W. 3 admitted that he could not claim to be any close friend of the petitioner's father and, in fact, he admitted to what might ordinarily constitute a state of unfriendliness between them. Kanayalal who had married the appellant's sister was the adopted son of one Nanikram who was stated to have died leaving a will by which he disposed of his properties in favour of a trust. The trustees, including Maganmal who was one of the trustees, upheld the validity of the will and claimed the properties for the trust, but Kanayalal challenged the truth and validity of the will and claimed the property as the heir of Nanikram. It was stated by Maganmal that himself and the appellant's father became acquainted with each other when they happened to meet in connection with this trust estate and when the appellant's father came to him to sponsor the interests of his son-in-law. This apart, the talk between himself and the appellant's father as a result of which the permission is said to have been granted was thus stated by Maganmal in his evidence:

"I (Maganmal) talked to the petitioner's father in Bombay in collection with the securing of permission for the respondent at the most for five months. I straightaway talked to the petitioner's father about the securing of the permission for the respondent. There was no other topic discussed between myself and the petitioner's father. The talk between myself and the petitioner's father took place in the compound of Ishardas Temple when I and the petitioner's father came out of the temple. I took the petitioner's father aside when I had a talk with the petitioner's father."

This would not be a very credible story, because if to the requests of the respondent's father on two or three occasions the appellant's father had refused permission it does not stand to reason that to a person situated as Maganmal was in relation to him he would have yielded merely because it was mentioned by Maganmal. The learned trial Judge who had an opportunity of seeing Maganmal in the box was not impressed with his evidence and for the reasons we have set out earlier regarding the relationship between the appellant's father and Maganmal learned trial judge considered that the story of Maganmal being deputed to obtain permission and his having obtained permission was false. We are inclined to agree with the learned trial judge in this appreciation of the oral testimony. If Maganmal's evidence is rejected then the entire superstructure of the respondent's case about the consent of the appellant's parents must fall to the ground. In this connection there arc a few other matters to mention. It was common ground that the appellant's father was, at the time of the trial, away at Tokyo on business and he was not in a position to be examined as a witness. The learned judges of the High Court, however, drew an inference adverse to the appellant from (1) his not calling his mother as a witness, and (2) the non-examination of maidservant who was stated to have been in the house at the time when the respondent left it on February 26, 1954. We do not agree with the learned judges of the High Court in the inference so drawn. If Maganmal's evidence is rejected, as it must, the father of the respondent who supported the story of Maganmal's intervention would not come out with flying colours and if his evidence as to this part is rejected we consider that it was not incumbent on the appellant to adduce the negative evidence of his mother etc., at the risk of an adverse inference being drawn against him in the event oil his not doing so.

Besides, there are some circumstances which lead to the inference that the story spoken to by the respondent about her parents-in-law being per sent at the time of her departure and their loading her

with gifts of jewellery and clothes is not credible. If really the respondent had left the house with the consent and goodwill of the appellant's parents or if as she would have it in some of her letters, it was the appellant himself who suggested her going abroad with her father to recoup her health. there could be no explanation for the conduct of the respondent in ,not going over to the house of the appellant during her stay in Bombay in June, 1954, for a fortnight or more when she was there in connection with her passport, and when she stayed admittedly within a few minutes' walk of the appellant's place. There would also be no explanation for her failure to inform the appellant and his parents about her departure from Bombay on July 7, 1954. It is only necessary to add that even in the first cable which the appellant sent her on coming to know of her departure from India the appellant complained that she had left India secretly without his knowledge and consent to which there was no contradiction in the reply by cable that she sent on July 22, 1954, though in her later cablegrams and letters she asserted that she had such a consent. There are several other matters which have been mentioned by the learned trial judge, such as the discrepancies in the several versions that the respondent spoke to from time to time and between these and the evidence given by her father and that of Maganmal coupled with her case as set out in the -pleadings as circumstances for discarding the entire story as false, but to these it is not necessary for us to advert in view of the broad features we have pointed out which have led us to the conclusion that the respondent did not leave the house of the appellant with his consent but that she did so of her own accord and without his knowledge.

The next matter for enquiry is as to the animus which prompted the respondent to leave the appellant's house. There was admittedly no incident which led to the departure from the matrimonial home which could throw light on that question nor is there any contemporaneous declaration of the respondent. The learned trial judge has set out the history of the relationship of the parties ever since their marriage up to 1954 as the background in which the simple act of leaving should be viewed for the purpose of determining the animus with which that act was done. The learned Judges of the High Court considered that this was not a proper approach to the question. Without deciding on the correctness of the approach of the learned trial judge, we shall proceed on the basis that the learned judges were right in discarding the earlier history of the relationship between the parties as irrelevant for determining whether the respondent in removing herself from her husband's house did or did not intend her withdrawal to be permanent and with a view to disrupt their marriage and terminate their married life. We shall consequently confine ourselves to the events and matters which transpired after she left the appellant's home to determine what her intention was at the time when she left it. The first matter to which reference must be made is the fact that after reaching Poona on February 26, 1954, until the end of May of that year she never wrote any letter to her husband. If, as we have found earlier, she left the appellant's house without his Consent or even knowledge, the failure on her part to intimate to him as to where she had gone would certainly be a relevant circumstance indicative of the animus which impelled her to leave the home. This is, no doubt, a slight circumstance, but she has really no explanation to offer for her silence and particularly so when taken in conjunction with the case that she put forward that she left her husband's place with the blessings of her parents-in-law and almost at the suggestion of her husband in order that her health might improve.

The next circumstance which, however, is very much more important, is her declaration on the occasion when the appellant and Dr. Lulla visited her at Poona towards the end of May. The learned trial judge, as stated earlier, has accepted that Dr. Lulla and the appellant did visit her at Poona as spoken to by them and that her story denying this meeting is false. The learned Judges of the High Court also did not accept her denial of the meeting, but they however refused to attach any importance to the

evidence of Dr. Lulla for the reason that he was unable to specify the exact words of the questions put to her and her answers. We do not agree with the learned judges about the value to be attached to the evidence of Dr. Lulla. The relevant portion of Dr. Lulla's evidence runs thus :

"I told her (the respondent) to go back to Bombay and then settle the differences whatever they were between the petitioner and the respondent but she said that she was not prepared to go back for ever. There was no further talk between myself and the respondent. The petitioner had a talk with the respondent first and then I had a talk with the respondent. I cannot recollect what the petitioner actually told the respondent. The respondent did not mention the differences which she had with the petitioner' She only stated that she was not prepared to come back to the petitioner for ever."

Now, it will be seen that this evidence is categorical. It Consists of two parts: The first is as regards the gist of the conversation between the appellant, and the respondent when they were together. He admits he was not present when they talked to each other and it is the question and answer at that stage, i.e., between the appellant and the respondent that the witness is unable to state to the Court. The second part of the evidence is in relation to the questions that he himself put to the respondent. There is, no ambiguity in his evidence either about the questions which he put nor about the answers which she gave. The comment of the learned judges that the witness was unable to reproduce the exact words of the question put to the respondent and the words of her answer does not obviously apply to this second part of the witness's testimony. If Dr. Lulla be treated as a truthful witness, and even the learned judges of the High Court did not express any view to the contrary, it is clear that the respondent had specifically stated to him that she would never come back to her husband's home. There is thus clear evidence and satisfactory proof that besides the factum of desertion there was also the animus descrendi at the time when she left the husband's house or at least at the time of this meeting -it Poona at the end of May, 1954.

The matter does not rest here for there is further proof of her animus afforded by her conduct up to the time of her leaving India for abroad on July 7, 1954. We are, here, referring to three matters: (1) Her presence in Bombay for a fortnight or for a month, whichever it be, at her uncle Tola Ram's place five minutes walk from the appellant's residence and her failure to call on the appellant even for the purpose of seeing her boy Ashok; (2) her conduct in giving her address in India as Tola Ram's place in the application for a passport and in the passport itself; and (3) her failure to inform the appellant of her departure from Bombay and her not calling on him even when she was leaving India for a stay of a considerable duration abroad. If then the conduct of the respondent was an act of desertion with the requisite animus when it started, the question next to be considered is whether it continued for the duration of two years before the presentation of the appellant's petition under s. 10(1)(a) of the Act to satisfy the requirements of the statute. We have already set out the correspondence which passed between the parties. In the first telegram which was exchanged between them and which started immediately the appellant got information that the respondent had left India-towards the end of July, 1954-he required the respondent to return to India immediately. In her replies she stated that she would return, not immediately-we are not, here, concerned so much with the reasons which she gave for not so returning-but after her health improved. If her offer to return after sometime was genuine and sincere and represented her then true feelings and intention it cannot be disputed that the desertion would be brought to an end because thereafter the animus deserendi would be lacking, though the factum of separation might continue. On the other hand, it cannot also be disputed that if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing. The question

for inquiry would, therefore, be whether these offers by the respondent to return were sincere. In this connection it is riot without significance that there are admittedly several occasions on which the respondent could have returned to India but she did not do so until April 1956. One of these was when one. Mr. Choith Rama relation of the parties-returned to India. It is admitted by both the respondent as well as her father that it was possible for the respondent to have returned to India with Choith Ram but it was stated that she did not do so because she had not been invited to some wedding in the appellant's house. We consider this explanation not satisfactory or convincing. If, as -we have found, she had left the appellant's house without his consent, and she expressed her determination not to return to him when the appellant and Dr. Lulla met her in May in Poona, and when in spite of repeated assertions in her letters and telegrams that she would be coming back, but she fails so to return when she had occasion and opportunity to do so, we consider that her acts and conduct in failing to return are entitled to more weight as evidence of her true intention than her assurances contained in her letters. We are not, therefore, prepared to hold that bona fide intended to return to her husband when in her letters and telegrams, to which we have already adverted, she expressed her intention to return to him. Besides, it would be seen that even after she returned to India in April, 1956, she did not go straight to her husband's house or even inform him of her return to India but on the other hand went away to Kashmir and that state of things continued until the petition was filed on September 20, 1956. If nothing more happened between the parties it is clear that the petitioner would be entitled to the relief which he sought as there was satisfactory proof of desertion as defined by the statute for the full term of two years.

The point, however, that forms one of the major bases of the judgment of the learned Judges and which was strenuously sought to be supported by Mr. Aggarwala, learned counsel for the respondent, was based upon the letter of the appellant dated April 1, 1955, as affording a justification in law for her refusal to come back to join him.

Before proceeding to deal with the contents of the letter and the other points urged in relation to it, it might perhaps be useful to set out the legal position in the light of which the entire matter has to be considered. As stated by Scott. L. J., in Tickler v. Tickler[3], quoting the words of Lord Romer in an earlier decision :

"The question whether a deserting spouse has a reasonable cause for trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be a question of fact."

The question for consideration in such cases is "Is the conduct of the deserted spouse such as to excuse the deserting spouse from making any attempt to put an end to the desertion or from attempting any reconciliation?" (Vide also Brewer v. Brewer[4]. The basis of this rule rests on this, that such conduct on the part of the deserted spouse would legally operate as a consent to the existing separation and would have the effect of absolving the deserting spouse from any obligation to return to the matrimonial home or 964. to make amends for her improper conduct, for the petitioner in a petition for judicial separation grounded on desertion by the other spouse has to prove that for the period of two years specified in s. 10(1) (a) of the Act the respondent has without cause been in desertion and that intention must be proved to exit through out that period. If, therefore, during that period the respondent has just cause to remain apart he or she would not be in desertion and the petition for judicial separation would fail.

3 [1943] 1 All E.R. 7, 59.

4 [1961] 3 All E.R. 957,

It would be seen that we have here the interaction of two distinct matters which have to coexist in order that desertion might come to an end. In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an. impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse. It appears to us that the principle that the conduct of the deserted spouse which is proved not to have caused the deserting spouse to continue the desertion does not put an end to the desertion appears to be self-evident and deducible from the legal concepts underlying the law as to desertion. The position is besides supported by authority. We might usefully refer to the following passage in the judgment of Willmer, L.J., in Brewer v. Brewer[5] where, explaining certain observations of Lord Macmillan in Pratt v. Pratt [6], he said :

"It remains for consideration however, exactly what Lord Macmillan meant when he spoke of the husband 'making it plain' to his deserting wife that he will not receive her back. He cannot have meant, I apprehend, that a deserting wife is entitled to take advantage of any chance statement that her husband may have made, irrespective of whether it had any effect on her mind. It seems to me that what Lord Macmillan must have meant was that a deserted husband cannot complain if what he has said or done has in fact caused hi-, wife to desist from making any attempt at reconciliation which she otherwise would have made. If this view be right, it becomes obvious at once that the question whether the conduct of the husband was such .is to bring the wife's desertion to an end cannot be treated, as counsel for the wife (at any rate at one point of his argument) appeared to invite us to treat it, as an abstract question of law. It becomes necessary to consider the facts of the particular case, in order to ascertain what in fact was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse."

We should add that this expresses our own view of the legal position.

We shall now proceed to consider the letter of the appellant dated April 1, 1955, and its significance for the purposes of the defence of the respondent in the light of these principles. The questions that arise on this letter fall into two broad classes : (1) The exact meaning and construction of the expressions used in the letter, and (2) its impact on the mind of the respondent. As to the meaning of the letter the rival contentions are these. According to the appellant the letter was merely the outpourings of an angry and grievously injured husband who found his wife persisting in keeping away from him and expressing happiness at her stay in and movement from place to place in foreign countries. In this connection the expressions used in the letter were put to the appellant in great detail during his cross examination and the burden of his explanation was that he never intended to impute any unchastity to the respondent. It is not necessary to set out the entirety of the letter but we would make a few extracts for the purpose of judging whether the letter could bear the interpretation which the appellant asserted was his intention in writing that letter:

"They (the appellant's parents) have overlooked all your faults and treated you with love and kindness like their own daughter and have made all possible efforts to raise you up from your low turpitude and

5 [1961] 3 All. E.R. 957.

6 [1939] A.C. 417, 420.

make you a decent woman It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds. ... Just think how often have I counseled you against your unceasing pleasure hunt which has brought only shame and misery to our whole family It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone SO far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife In spite of all my efforts, you have completely deserted me and chosen the path of pleasure and perversion,at any cost. You are only looking for some cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn into your game."

As we have stated earlier, the appellant expressly disclaimed in the witness box that he ever considered her unchaste or that in that letter or otherwise he imputed unchastity to her. The learned trial judge believed the appellant's testimony as to what he intended to convey by this letter and was of the view that the contents were reasonably capable of being understood in the manner suggested by the appellant. We cannot say that this is not a possible interpretation of the letter and that it must be held that it was intended to impute unchastity to the wife. We must, however, hasten to point out that the intention of the writer is neither very relevant nor, of course, decisive of the matter. The question is what the words were reasonably capable of being understood, and if they have been so understood it is no answer that the writer did not intend his words to have that meaning. In view of what we are about to say, it would not be really necessary for us to say whether, reasonably understood. the words would not impute sexual immorality to the respondent, but we shall assume that the learned Judges of the High Court were right in their interpretation of the. letter and the insinuations it contained. The question, however, is how she understood and what her reactions were.

The next question for consideration therefore relates to the impact of this letter on the respondent, for it is ultimately that that would determine, in the present case the legal effect of the conduct of the appellant in terminating or not terminating the desertion that up to then continued. As to this, the position stands thus : The evidence of the respondent was that she received the letter at Hong Kong, and she stated :

"I read that a bit. On the next day I left for Manila. .... There I was appraised of the contents of the letter and then I was shocked at the contents of the letter and my health became worse at Manila."

The letter is stated to have been received in the evening and she was to leave Hong Kong for Manila at 10 a.m. the next day. According to one portion of her evidence she read a part of the letter on the day she received it but she had no time to read the whole letter, but she corrected herself later and stated that the entire letter was then read, but that she understood only a portion of the letter on the day it was received and the rest of it explained to her in Manila. It was her cousin--one Khem Chand-who is said to have been asked to read and explain the letter because she did not understand fully its contents. This was at Hong Kong and he read that letter during the night after he returned home from office. Before he finished reading that letter she said she went to bed. He was reading, that letter till late that night. She, however, slept by then. Khem Chand she said, promised to explain the contents the next morning but there was no time 1eft for this as she left for Manila that day. It is apparent from this state of evidence that it did not have very much upon the respondent or that she under-stood the letter as really charging her with immorality. It' is just possible 24-2 S. C. India/64 that she understood

its contents as merely an admonition ,by the husband at her being away from him and at her conduct in asking him to go over to Hong Kong instead -of returning to him immediately, as he desired in his telegrams. She apparently attached not much significance to this letter and that is clear from the way in which she got the letter read and explained to her partly at Hong Kong and the rest at Manila. And this notwithstanding that her father was there to assist her in understanding the contents of that letter and its implications.

This is so far as the oral testimony of the respondent is concerned, but possibly of more significance and of higher evidentiary value than the inference to be drawn from the statements in her deposition in Court is the reply that she sent from Manila to this letter on April 12, 1955. It is necessary to examine with some care the contents of this reply. It is addressed to him.as 'My dearest husband'. It consists of five paragraphs. In the first she acknowledges as letter dated April 1, 1955. of the contents of that letter those regarding which she deals in the 1st paragraph are: (1) his statement that he had not received any letter from her dated August 2, 1954 and (2) a denial of the fact that she left his house without his knowledge and consent and an assertion that he and his parents consented that she should go and stay 'With her relations for a while. The second paragraph is again taken up with the same matter and repeats (1) that she .did not leave the house without his knowledge and consent, and (2) she left the house only for reasons of her health. The third paragraph states that her health had improved but that she would like to stay a little longer with her parents in order to improve it more and then she would return to him and to her "dear son Ashok". The next paragraph is concerned with denying the unfounded accusations contained in his letter and these are characterised as "merely the product of his hallucination" and that she would ignore them because they are not based on truth and in the final paragraph she ends by repeating that site was vacationing with her parents only for the improvement of her health and for no other purpose and lie would kindly allow her to stay with her parents a little longer for her welfare and advantage and she winds up the letter by assuring him "As soon as my health is completely improved I shall of course come back home to you and to our son".

Now to the question as to what is the impact of the appellant's letter on the mind of the respondent. In the face of this letter could it be said that she understood the appellant's letter as a justification for her to stay apart? For this purpose it is not necessary to consider whether she understood it as imputing unchastity to her or not. As we have already pointed out, it is doubtful whether she did so. If it were so it would not be reasonable for her to read the letter at Hong Kong in part or not understanding it there and not attaching any significance to it as an imputation of a serious character against her morality. But in whatever way she understood it, it is obvious that it did not have any effect on her mind in the matter of persuading her or impelling her to stay apart from her husband, for we find in her reply repeated assertions that she intended to come back to the husband. We do not, therefore, agree with the learned judges of the High Court that the appellant's letter of April 1, 1955, would constitute an interruption of her desertion which had commenced from February-May, 1954, by its being a just cause for her to remain away from the matrimonial home.

As already stated, the letter of April 12, 1955, was the last letter which passed between the parties and though she stayed abroad for nearly a year thereafter she did not write to the appellant and even when she came to India in April, 1956, she did not go to her matrimonial home as she had promised to do in this last letter of hers just referred to. A point similar to the one dealt with by us in relation to the telegram of the respondent dated June 24, 1955, and her letter dated March 3, 1955, arising out of the statements contained in them that she intended to return to the husband on coming over to India and the effect of such a statement in terminating the desertion has also to be considered with reference to

the promise to return to the husband contained in this letter of hers dated April 12, 1955. As already pointed out, if the offer to return was genuine and sincere and was made with the intention of being kept and as indicative of a desire felt to return to the matrimonial home it would constitute a break in the desertion and thus disentitle the appellant to any relief under s. 10(1) of the Act because in the face of such an intention the desertion of two years duration could not be established. We are, however, satisfied that the intention expressed in this letter to return to the husband was not genuine or sincere. This is shown beyond doubt by the following facts: (1) She wrote no letter to the appellant after April 12, 1955, right up to the date of the petition, (2) she did not intimate to him about her arrival in India-a fact strongly suggesting her disinclination to meet him and to go to his house, (3) that even after she returned to India nearly a year after her letter of April 12, 1955, she did not go to her husband nor was any attempt made by her to contact her husband through friends before the filing of the petition. The facts therefore and her conduct outweigh any assertion contained in this letter and they convince us that she did not entertain any genuine desire to return to her husband's home when she wrote those words in her letter to him dated April 12, 1955.

It was not contested that if desertion started in February May, 1954, as we have found, and was not put an end to and if no justifiable cause for the continuance of the desertion was afforded by the appellant's letter of April 1, 1955, there was no other defence to the petition of the appellant under s. 10(1) of the Act.

The result is that the appeal is allowed, the judgment of the High Court reversed and the decree for judicial, separation passed by the learned trial judge restored with costs here and in the High Court.

SUBBA RAO J.-I regret my inability to agree. This appeal by certificate presents a facet of the social and sociological problem of a young Hindu woman landed by marriage in a joint family and of her predicament therein. As Rajagopala Ayyangar, J., has traced the course of the litigation, it is not necessary to cover the ground overagain. Two questions arise for consideration, namely, (1) whether there was desertion by the respondent without reasonable cause of her matrimonial home; and (2) whether the appellant had prevented the respondent during the statutory period from bringing the desertion to an end. Before I consider the evidence in the case, it will be convenient to notice the relevant aspects of the law pertaining to the doctrine of desertion. The Hindu Marriage Act, 1955 (Act 25 of 1955), hereinafter called the Act, codified the law in that regard. The material provisions of the Act read thus : .

Section 10. (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the around that the other party-

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Explanation.-In this section, the expression "desertion", with its grammatical variations and cognate expressions, means, the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party,, and includes the willful neglect of the petitioner by the other party to the marriage."

Under this section a spouse can ask for judicial separation if the other spouse has deserted her or him for a continuous period of not less than two years. This provision introduces a revolutionary change in the Hindu law of marriage. It is given retrospective effect. A spouse in India except in some states, who

never expected any serious consequences of desertion, suddenly found himself or herself on May 18, 1955, in the predicament of his or her marriage being put in peril. If by that date the prescribed period of two years had run out, he or she had no locus penitential and could retrieve the situation only by mutual consent. Section 10(1)(a) does not proprio vigore bring about dissolution of marriage. It is a stepping stone for dissolution. On the deserted spouse obtaining a decree for judicial separation, the said spouse can bring about divorce by efflux of time under s. 13 (1) (viii) of the Act. The expression "desertion" came under the judicial scrutiny of this Court in Bipin Chander jaisinghbhai Shah v. Prabha (1) [1956] S.C.R. 838.

wati(1). There, the question arose under s. 3 (1)(d) of the Bombay Hindu Divorce Act, 1947 (Bom. 22 of 1947)., This Court, on the facts of that case, held that there was no desertion. The said section read :

"(1) A husband or wife may sue for divorce on any of the following grounds, namely.....

(d) that the defendant has deserted the plaintiff for a continuous period of four years.

"Desertion" was defined in s. 2(b) in these terms: "'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse." Sinha, J., as he then was, speaking on behalf of the Court after considering the relevant textbooks and decisions on the subject, summarized the law thus, at p. 851 "For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively.

The learned judge dealt with the mode of putting an end to the state of desertion as follows, at p., 852 :

"Hence, if a deserting spouse takes advantage of the locus penitantiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial home with all the implications of marital life, before the statutory p eriod is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former."

Based on that reasoning the learned Judge proceeded to lay down the duty of. the deserted spouse during the crucial period "Hence it is necessary that during all the period that there has been a desertion the deserted spouse 'must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable."

Adverting again to the burden of proof and the nature of evidence required to prove desertion, the learned judge made the following observations, at p. 852 :

"It is also well settled that in proceedings for divorce the plaintiff must, prove the offence of desertion like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted, for to the satisfaction of the Court."

Collating the aforesaid observations, the view of this Court may be stated thus : Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely.' (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4)

absence of his or her conduct 'giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule prudence the evidence of the petitioner shall be corroborated. In short this Court equated the proof required in a matrimonial case to that in a criminal case. I am bound by this decision. I would, therefore, proceed to discuss the law from the point reached by this Court in the said decision.

There is some controversy on the question on Whom the burden of proof lies to establish that the deserting spouse has just cause or not to leave the matrimonial home. The judgment of this Court is clear and unambiguous and it throws the burden on the petitioner seeking divorce. This view is consistent with that expressed in leading judgment of English Courts.

In Pratt v. Pratt(1) the House of Lords considered the said aspect. Lord Macmillan stated, at p. 438, thus:

"In my opinion, what is required of a petitioner for divorce on the ground of desertion is proof that throughout th e whole course of 3 years the respondent [1939] 3 All E.R. 437.

has without cause been in desertion.....In fulfilling its duty of determining whether,on the evidence, a case of desertion without cause has been proved, the Court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. if, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may, have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion".

On the question of just cause, Lord Romer made some pertinent remarks, at p. 443, which are relevant to the present enquiry. There, as here, though under different circumstances, the deserting spouse, the wife, after previous correspondence did not call on her husband.

In that context, Lord Romer observed:

It would, in my opinion, be quite unreasonable to bold that the respondent, guilty though she was of the serious matrimonial offence of desertion, should be expected to present herself at her husband's door without any knowledge of how she would be received, 'and therefore at the risk of being subjected to the indignity of having admission refused by her husband or by one of his servants..... It could not be expected that she should suddenly make an unheralded entry into his house."

Though it was necessary, in order to put an end to her desertion, for the wife to take some active step towards returning to the matrimonial home, Lord Romer held that she had taken such steps by writing letters and that the fact that 'she. did not physically appear in the matrimonial home did not make is any the less a just cause on her part. In Dunn v. Dunn[7], Denning L.J., as he then was, laid down the scope of burden of proof in such a case, at P-823, thus:

"The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself : Is the legal burden discharged? Has the husband proved that she deserted him without cause?"

7 [1948] 2 All E.R. 822.

This passage brings out the well known distinction between legal burden and onus of proof. Legal burden always remains on the petitioner ; and onus of proof shifts and is a continuous process. But, as the learned Lord points out, the court has to hold on the evidence whether the legal burden to establish desertion without cause has been established by the petitioner.

In Day v. Day[8], the husband petitioned for divorce on the ground that his wife had deserted him. The wife relied on the fact that the husband committed adultery and that, therefore, the desertion was not without cause. The Court held that the burden was upon the petitioning husband to prove that his adultery was not the cause of his wife's desertion and that he had proved the same, as the facts proved established that she had formed her intention not to resume cohabitation independently of his adultery. The legal position is stated thus, at p. 853 :

"On the facts of the present case that involves the husband proving affirmatively that the mind of the wife was not in any way affected by her knowledge of the husband's adultery. Clearly the burden is a heavy one, and doubtless in many cases it will be one that a petitioner will not be able to discharge."

In Brewerv. Brewer[9], the Court of Appeal explained the views expressed by Lord Macmillan and Lord Romer in Pratt v. Pratt(1). Willmer, L.J. after quoting the observations of Lord Macmillan in Peatt's case[10], proceeded to state:

"This passage, although not necessary for the decision of that case, was expressly approved and adopted by Lord Romer in Cohen v. Cohen(1), and must, I think, be accepted as authoritative having regard to the fact that all the other members of the House expressed their concurrence with Lord Romer."

The case-law here and in England throws the burden of proof on the petitioning spouse to prove that desertion was without cause.

Another aspect of the question may now be touched upon. The definition of desertion under s. 10of the Act, the argument proceeds, is much wider than that under the English law or under the Bombay Act considered by this Court. Emphasis is laid upon the following words in the explanation to s. 10(1) of the Act :

"includes the willful neglect of the petitioner by the other party to the marriage."

The expression "includes", the argument proceeds, enlarges the scope of the word "desertion", and takes in by definition the conscious neglect on the part of the offending spouse, without the requisite animus deserendi. This argument, if accepted, would impute an intention to the Parliament, which was entering the field for the first time, to bring about a revolutionary change not sanctioned even in a country like England where divorce or separation for desertion had long been in vogue. We would be attributing to the Parliament an incongruity, for, in the first part of the explanation it was importing all the salutary restrictions on the right to Judicial separation. but in the second part it would be releasing the doctrine, to a large extent, of the said restrictions. By such a construction the legislation would be made to defeat its own purpose. On the other hand, the history of the doctrine of "desertion" discloses some limitations thereon conceived in the interests of society and the Parliament by the inclusive definition couched in wide language could not have intended to remove those limitations. The inclusive definition is only intended to incorporate therein the doctrine of "constructive desertion" known to English law and the language is designedly made wide to cover the peculiar circumstances of

8 [1957] 1 All E.R. 848.

9 [1961] 3 All E.R. 957.

10 [1939] 2 All E.R. 437.

our society. In Rayden[11] on Divorce, 7th Edn., the expression "constructive desertion" is defined thus, at p. 155 :

"Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife, and the case of a man who compels his wife by his conduct, with the same intention, to leave him. This is the doctrine of constructive desertion."

Adverting to the question of animus in the case of constructive desertion, the learned author proceeded to observe, at p. 156, thus :

"It is as necessary in cases of constructive desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion as it is in cases of simple desertion. The practical difference between the two cases lies in the circumstances which will constitute such proof, for, while the intention to bring the matrimonial consortium to an end exists in both cases, in simple desertion there is an abandonment, whereas in constructive desertion there is expulsive conduct."

The ingredients of desertion as well as constructive desertion are the same, namely, animus and factum, though in one case there is actual abandonment and in the other there is expulsive conduct. Under certain circumstances the deserted spouse may even stay under the same roof or even in the same bed-room. In our society, it is well known that in many a home the husband would be guilty of expulsive conduct towards his wife by completely neglecting her to the extent of denying her all marital rights, but still the wife, because of social and economic conditions, may continue to live under the same roof. The words "willful neglect" in the explanation were certainly designed to cover constructive desertion in the English law. If so, it follows that willful conduct must satisfy the ingredients of desertion as indicated above. Hence, the appellant could not take advantage of the inclusive definition unless he established all the ingredients of constructive desertion, namely, animus, factum and want of just cause.

There is yet another legal contention which may be disposed of before I consider the facts. It is based on s. 9 of the Act, which reads :

(1) when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court, for restitution of conjugal rights and the Court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. (2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce."

The contention on behalf of the appellant is that s. 9(2) of the Act affords a dictionary for the expression "without reasonable cause" and that it shows that reasonable cause in the explanation could only, be that cause which will be a legal ground for the offending spouse to resist the petition by the other for restitution of conjugal rights. It is further contended that under cl. (2) thereof such legal ground could only be the legal ground on which there could be judicial separation or nullity of marriage and, therefore, the reasonable cause in the explanation to s. 10should also be only such grounds like cruelty etc. There is a fallacy in this argument. An illustration will bring it out. A husband files an application against the wife for restitution of conjugal rights under s. 9 of the Act. The wife can plead, inter alia, that the husband is not entitled to restitution of conjugal rights as lie has deserted her without

11 [1940] 2 All. E.R. 331, 335.

reasonable cause. Section 9(2) of the Act does not afford any dictionary for ascertaining the meaning. of the expression "reasonable cause". We have to fall back again for its meaning on the principles laid down by decided cases and the facts of each case. That apart, s. 9 and s. 10 deal with different subjects-one with restitution of conjugal rights and the other with judicial separation. We cannot import the provisions of the one into the other, except in so far as the sections themselves provide for it. The explanation does not expressly or by necessary implication equate reasonable cause with a legal ground for sustaining a plea against an action for restitution of conjugal rights. Indeed, it is a limitation on one of such legal grounds. There is an essential distinction between the scope of the two sections. The Legislature even in socially advanced countries lean,, on the side of sanctity of marriage ; therefore, under s. 9 of the Act, our Parliament imposes stringent conditions to non-suit a claim for restitution of conjugal rights. On the same reasoning, under s. 10 of the Act, it does not permit separation of spouses on the ground of desertion except when the desertion is without reasonable cause. The expression "reasonable cause" must be so construed as to bring about a union rather than separation. The said expression is more comprehensive than cruelty and such other causes. It takes in every cause which in a given situation appears to be reasonable to a Court justifying a spouse to desert the other spouse. This view is consistent with the English law on the subject. In Halsbury's Laws of England, 3rd Edn., Vol. 12, the author says, in para. 484, at p. 257 thus :

"Any matrimonial offence, if proved, is a ground for the other spouse withdrawing from cohabitation. Further conduct which falls short of a matrimonial offence, that is conduct not amounting to cruelty or adultery, may excuse desertion."

In Edwards v. Edwards[12] this idea was succinctly brought out. There it was stated that conduct short of cruelty or other matrimonial offence, might afford cause for desertion. So too, in an earlier decision in Yeatman v. Yeatman[13] it was held that reasonable cause was not necessarily a distinct matrimonial offence on which a decree or judicial separation or dissolution of marriage could be founded. I am, therefore. of the opinion that s. 9 of the Act does not throw any light on the construction of the expression "without reasonable cause" and that whether there is a reasonable cause or not in a given case shall be decided only on the evidence and the peculiar circumstances of that case.

The result of the said discussion may be stated thus The legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by word or conduct from cohabitation. The expression "willful neglect" included in the section does not introduce a new concept in Indian law unknown to the English law, but is only an affirmation of the doctrine of constructive desertion. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar situations that arise in an Indian society and home. No inspiration could 'be derived from s. 9 of the Act in order to construe the scope of the expression "without reasonable cause" and whether there is a reasonable cause or not is a question of fact to be decided on the facts of each case. I shall now proceed to consider the facts of the case. The main question is whether the appellant has proved that the respondent deserted him within the meaning of the term as explained above. To ascertain that fact from a correct perspective it is necessary to notice broadly the marital life of the couple since their marriage. The appellant is an

12 L.R [1950] P. 8.

13 L.R. [1868] 1. P. & D. 489.

M.B.,B.S. and a medical practitioner carrying on his profession in Bombay. He belongs to a well-to-do family, his father being a businessman. The family is comparatively old-fashioned in habits and customs. The respondent is the daughter of one Vasanmal, a businessman, who had -branches in Singapore, Hongkong, Jakarta and Manila. Though he spent most of. his time in foreign countries in connection with his business, he always left his family in India and he used to visit his family in India whenever he could conveniently do so. Though the learned counsel for the appellant attempted to argue that the members of Vasanmal's family, including the respondent, were leading a fast life, there is nothing on the record, except some vague suggestions here and there, to support the said argument. It may be accepted that the respondent's father is comparatively a richer man than the appellant. On November 10, 1946, the appellant and the respondent were married at Hyderabad (Sind). On July 19, 1947, a male child was born to them and was named Ashok. Unfortunately for the couple, their even course of life was disturbed by the partition of India. In October, 1947, they had to migrate, as many others did, from Pakistan to India. Though the respondent's father was maintaining a family house at Lonavla, about 70 miles from Bombay, the members of the appellant's family including the respondent, went to the Colombo and were staying with the appellant's mother's brother. In or, about December, 1947, the appellant, along with his mother, left Ceylon for Bombay leaving the respondent and appellant's sisters in his uncle's house at Colombo. The respondent's version is that, as her sisters-in-law ill-treated her, she was not happy there and therefore she had to leave that place, along with her child, in January, 1948, to her parents' house at Lonavla. At the end of January, 1948, the appellant and his mother went to Lonavla and brought the respondent to Bombay. At the end of the first week of February, 1948, the respondent went back to Lonavla and came back to Bombay in or about August or September, 1948, and was living with the appellant for about 3 months. In or about that time, the respondent's parents shifted their residence from Lonavla to Poona and settled down there. Poona is about 100 miles from Bombay. In December, 1948, the respondent visited her parents at Poona and returned back to Bombay in February, 1949. According to her from February 26, 1954, she was living with the appellant in his house at Bombay and she a permitted to go and see her parents ; but according to the a pellant, she was going now and thento her parents' house. Much is made of her frequent visits to her parents' home, but it is ignore that the frequent visits were only made during the difficult days the evacuees were passing through. But the fact remains that from 1949 for about 4 years she was continuously living with her husband in his house. It is common case that the couple were not happy in their married life. The husband and wife give their versions of the reasons for this estrangement. The husband, as P.W. 1, attempts to throw the blame wholly on the wife He says that the respondent was disrespectful and indifferent to him, that she was proud and arrogant, that she refused to wear the clothes which were made for her by his parents on the ground that they were made of inferior stuff, that she was very disobedient and disrespectful to his parents, that she used to leave for her parents' house very often and sometimes without informing him, that she had no love or affection for him, that when she was in her parents' house she used to play cards, and drank at the parties given by her father, that she did not like to have children and that she was rude and insulting in her behaviour towards him and his parents. In the cross-examination lie admits that lie saw her drinking only twice or thrice at her father's parties, but none of his friends saw her drinking nor did she drink from 1947. He further admits that he saw her playing cards without stakes, but he had not seen personally her playing cards after 1946 or 1947. He admits that the relationship between his mother and the respondent's parents was not cordial. He describes her acts of disobedience thus:

"On the next day of our marriage, it was customary that she should put on the saree which we got made for her. We had such a saree already prepared. She refused to put on such a saree saying that the

same was too inferior to be put on by her. She on many occasions ordered him to do certain things for her. For example, on one day I told her that she should not spread her sarees on the sofa but she should keep the sarees wrapped and keep them in a cupboard. On the next day the same thing was repeated, namely, that she kept her saree spread on the sofa. I called her and requested her to wrap it. She asked me as to why I should not do the same. I protested and told her that I was speaking to her in a polite way and why she should order me to do things, whereupon she told me that her friends' husbands even do boot-polish and why I should not do even such trifling things."

A perusal of his evidence discloses that though he is an educated man he belongs to the old, school and takes offence for the most trivial things which another would ignore. A perusal of his entire evidence also discloses that he is highly respectful to his parents and that he was particular that his wife also should be obedient to them and particularly to his mother. Though the learned counsel for the appellant painted the respondent in his opening address as a highly sophisticated woman, addicted to all the evils of drink, dance etc., the evidence of the appellant, even if entirely accepted, shows that she is not highly educated, that she has not been ad. dieted to any bad habits such as drink, playing cards, smoking etc., and that she was living in the family house of her husband, though now and then she was going to her parents' house. ID the cross-examination the appellant also stated that he had to take the respondent in 1953 or 1954 to Dr. Marfatia, a psychiatrist, for treatment, indicating thereby that was under some nervous or mental strain.

Now let us see what the respondent says about her life in her husband's house. She says that at the time of her marriage her father gave a dowry of Rs. 25,000.00 and several presents and gifts, including clothes worth about Rs. 10,000.00, but her mother-in-law was not satisfied with the amount of dowry given by her father ; that her parentsin-law would not ordinarily permit her to visit her parents' house, that whenever such permission was asked for they used to refuse a number of times, but would allow her to go only once in a way ; that she, was abused for trivial things, such as when handkerchief'& were missing ; that the treatment of her mother-in-law and sisters-in-law from the beginning was cruel and when they made complaints to the appellant, he used to abuse her; that in Ceylon also they ill-treated her; that between 1949 and 1954 she was allowed to go to her parents' house only on two occasions, that is, once on the wedding of one of her sisters and the second time on the wedding of her cousin and during those occasions . she stayed with them only for a few days; that she'" refused permission to go to Poona even when her uncle died; that her parents-in-law,, not only said many 25-2 S C India/64 dirty things of her but they did not allow her to speak to her son ; that when her father-in-law scolded her son, he started weeping and she was scolded for interfering : that this incident happened in 1953 and that since then her husband ceased to talk with her ; that she was also prevented by her mother-in-law from doing any work for her husband or for her son, that she was also beaten by her husband sometimes ; that she was not allowed to see her child when he was ill; that in 1951 she heard that her husband attempted to remarry and even asked her to sign a paper giving her consent for him to do so that she was made to sleep on a bench in the drawing room till about the year 1952 and thereafter on the floor as her mother-in-law did not provide her with a bed. Her evidence discloses that she had no freedom in her husband's house, that she was abused and insulted by her parents-in-law and sisters-in-law, that she was not given the usual comforts which she expected in her husband's home, that she was not allowed to look after her husband and her child, that the husband took the side of his mother whenever there was trouble between her and her mother-in-law. There may be some exaggeration in this version, but by and large this evidence fits in what generally happens in an old-fashioned house where a girl with modern upbringing goes to stay as a daughter-in law of the house. It may therefore

be accepted that she was lead,rig a miserable life in her husband's house and she must have been under a terrible nervous strain.

What does the father of the respondent, who was painted as villain of the piece, say about this unfortunate situation in which his daughter was placed? Whatever may be said about him, his evidence discloses that he is very much attached to his daughter and he attempted to do what an affectionate father could possibly do in the circumstances. He supports -the evidence given by his daughter in regard to dowry and the reluctance of her parents-in-law to send her to his house whenever he requested the them to do so and also he speaks to the complaint made to him by his daughter about the ill-treatment meted out to her by her in-laws and also the want of cordiality between his family and the family of the appellant. I have gone through his evidence carefully He does not impress me as one who was out to wreck the life of his daughter out of pride or anger, but a loving father who tried his best to make her happy and to reconcile the couple, if possible. Whenever there was trouble he tried to persuade them to live together and whenever she was unhappy he tried to take her to his home and give her the necessary warmth of love and affection.

Neither the mother-in-law nor the father-in-law nor the sisters-in-law were examined in the case. If the mother inlaw had been examined, more details could have elicited, but unfortunately she was kept back, in my opinion, for obvious reasons.

The said evidence broadly gives the picture of the respondent's unhappy life in her husband's house and the mental strain she was putting up there.

In those circumstances in the month of November, 1953, respondent's father came to India and was very anxious to take her to his house at Poona and thereafter, with him, to foreign countries for a short time to enable her to recoup her health. With that object, the father approached the appellant's family cautiously and through mediators to at their permission. He says, in his evidence, that after he came to India he met the respondent at her husband's place of residence and observed that she was very pale, that she had lost weight and appeared to be much worried and unhappy. He asked the appellant and his parents to allow her to be taken to Poona, but the permission was not granted. Two or three months thereafter, he again came to Bombay two or three times and made similar requests, but they were all turned down. On one occasion, the respondent described to him her miserable condition under her husband's roof and be consoled her that he would get her the permission to visit him. He requested one Manganmal to intercede on his behalf with the appellant's father and get his permission to take the respondent to his house and thereafter abroad for recoupment of health. About a week thereafter, Manganmal told him that he had seen the appellant's father and made the request on his behalf, but the appellant's father wanted to confer with his wife and so he asked him to see him again a week thereafter. A week thereafter, he saw the appellant's father and repeated the request. The appellant's father requested him to see him 3 or 4 days thereafter. He went to him again, when the appellant's father gave the necessary permission. The witness promised to go to him on February 26, 1954 to fetch his daughter. He went there at 4.30 p.m. on that day and left ,or Poona by the Deccan Queen at about 5.30 p.m. on the same day. At the time when he went to appellant's house to fetch the respondent, the appellant's father and mother were present, but the appellant was not there. The respondent took the permission of her parents-in-law and accompanied him. This version is natural. It is unthinkable that a man of the status of respondent's father would carry away his daughter from her husband's house without taking the permission of her husband or her parents-in-law. It is not likely that the respondent would have run away from the house of her husband in the absence of her husband and parents in-law taking away the jewels with her as was suggested on behalf -of the

appellant. There is nothing in the cross-examination worth the name to belie the version given by this witness. It was the most natural thing any father in the position of the respondent's father would do in the said circumstances. I do not see any Justification to reject his evidence. The respondent in her evidence supports the evidence given by her father and, in addition, she says that on February 26, 1954, she took the permission of her husband before leaving the place. She asked him to allow her to take-her son, but lie refused to give the permission. It is said that while she said that her husband was in the house, her father said that he was not there. But she clearly says in her evidence that her husband was in another room and that she went to that room to take his permission. Obviously, the husband was not willing to face his father-in-law. Manganmal, who interceded on behalf of the respondent's father with the appellant's father, gives evidence as D.W. 3. He is the Managing Director of Chotirmall & Co., with branches in India and in foreign countries. He is a friend of the respondent's father. He corroborates the evidence of the respondent's father. He says in his evidence that he went to the appellant's house and asked his father to allow the respondent to stay with her father while he was in India, as, she had not been to her father's house for years. In the cross-examination it was suggested that he was not a friend of the appellant's father, that he, along with others, was a co-trustee with Kanayalal, a son-in-law of the appellant's father, of Nanikram's trust, and that in the dispute that was raised by Kanayalal's father, Nanikram, in respect of the subject-matter -of the trust, Kanayala was supporting his father whereas Manganmal was supporting the trust. He admits that he does not claim to be a friend of the appellant's father and that there was conflict of views between him and Kanayalal in respect of the trust, but adds that on that account there was no lack of cordiality between himself and the appellant's father. He is a respectable witness. He gave straightforward answers to the questions put to him. He did, not support the respondent's father completely in that he did not say that he asked for permission for the respondent's father taking the respondent to foreign countries. Presumably the further request was made by the respondent's father himself and not by this witness. If he had come to lie in the witness-box, he would have added the further request also. There is nothing unusual in the respondent's father requisitioning the services of this gentleman in preference to others more close to the appellant's father, for this witness is a respectable man and very well known to him and in A position and was also willing,, to intercede on his behalf. I do not see any reason why the evidence of this witness should be rejected.

As against this evidence, the appellant says that on February 26, 1954, he was not present when the respondent left his house, that no one, except the maid-servant was present in the house when the respondent left the house, that in the evening at about 6 O'clock he discovered that the respondent had left his house leaving some message with the maid-servant and taking away all her jewels and valuable clothes. He further says that he wrote some letters to his wife soon thereafter, but he did not receive any reply from her. But this was denied by the respondent; and there is nothing except his word for this. This is a remarkable story. If his wife had left him when nobody was present in the house, he would not have taken it so philosophically as he asks us to believe. On his own showing, he went to Poona only two or three months thereafter. He does not even tell us what was the message that she left with the maid-servant. The maid-servant was not examined. Neither his father nor his mother nor his sister were put in the witness-box. When three witnesses, the respondent, her father and a friend of her father, definitely gave evidence that the appellant's parents were approached and that they gave their consent, it was the duty of the appellant to examine them. No doubt some sort of explanation was given that the father was in Japan, but none in respect of his mother or the maid-servant. When the burden was upon the appellant to establish desertion, it is strange indeed that he should have thought fit to keep back the best evidence from the witnessbox. When the respondent and her father

depose that: they took the consent of the appellant's parents and if the parents of the appellant did not choose to come to the witness-box to deny it, a court ordinarily should accept the evidence of the father and the daughter unless their evidence is ex facie unnatural or -inherently improbable. But that cannot be said in this case, for what the respondent's father is said to have done is the most natural in the circumstances. It is said that the City Civil. Judge had seen the respondent's father, Manganmal and the respondent in the witness-box and he did not accent their evidence and that, therefore, the High Court should not have taken a different view. On this aspect of the case, after considering the evidence of the witnesses, the High Court says thus "The parents of the petitioner were available to give evidence in this case. but they have not been examined: nor has any explanation been given why the maidservant with whom a message was left by the opponent when she left the house, has not been examined in the case. We are left in this case with the two diametrically opposite version of the two interested parties:..... Having regard to these circumstances, we are of the view that the departure of the opponent from the house of the petitioner was, if not with his express permission, with his consent and full knowledge though such consent was given on account, of Some exasperation on his part."

I entirely agree with this view. It is consistent with the evidence given by the respondent's witnesses and also with the circumstances of the case and subsequent conduct of the parties. The appellant and his parents must have given the consent, though not willingly, either because of the importunities of the respondent's father or because of, the social pressure put oft them through the intervention of a respectable outsider. But they did not like the respondent's parents and therefore they did not like the respondent going to their house. It was a permission reluctantly given and she was afraid that it would be wit& draw.-Li. That is why there was no correspondence between the couple during all the days she was staying at Poona and she did not even meet the appellant or his parents when she was boarding the ship at Bombay. I would therefore, bold that the respondent left her matrimonial home with the permission of the appellant and his parents for the purpose of staying with her father at Poona and thereafter to leave for foreign countries for short stay to recoup her health. Strong reliance is placed upon an incident that is alleged to have taken place in May 1954. According to the appellant, he and his friend, Dr. Lulla, went to Poona to persuade her to come back to his house, but she definitely told, them that she would never return to his house. It is said that this incident would show that she had decided to leave him permanently. In the petition this May incident was not specifically 'mentioned nor was it stated that it afforded a cause of action. There was no mention of the appellant and his friend Dr. Lulla going to her and her, stating to them that she would never return to his house. Before the High Court the learned counsel appearing for the appellant did not seek to rely upon this meeting 2nd the reply alleged to have been given by the respondent as furnishing a cause of action for founding a claim for relief of judicial separation. This incident was relied upon: only in support of the appellant's case that the respondent, was intransigent throughout and was unwilling to go back: to the petitioner. Indeed, the learned counsel appears to admit that the evidence of the appellant and Dr. Lulla was not clear as to what was the precise question asked and what was the exact answer given by the respondent. It would, therefore, be seen that this incident did not loom large either in the pleadings or in the arguments before the High Court. But it became a sheet-anchor of the appellant's case before us. Let me, therefore, consider this aspect of the case in some detail.

The appellant says in his evidence that he went to Poona along with Dr. Lulla towards the end of May 1954, that he saw the respondent at Poona and inquired of her to why she left his house secretly and that she told him that she had decided not to come back to him. This is interested evidence and is inconsistent with my finding that she left his house with his consent as well as with the consent of his

parents. His evidence is supported by the evidence of Dr. Lulla. But the respondent contradicts this evidence. She denies the incident altogether. She is also A interested witness. Dr. Lulla, as D.W.3, says that he went to Poona along with the appellant, that the appellant tiled to persuade the respondent to come back to him, that thereafter he also tried to persuade her to come back to the appellant, but she told them both that she had made up her mind not to go back for ever. He is a doctor with a fairly good practice and a friend of the appellant. But his crossexamination discloses that he did not ask the respondent why she left the appellant, that he was with the respondent at Poona only for a few minutes, that he could not recollect what the appellant told the respondent actually and that she only stated that she was not prepared to come back to the appellant for ever. It also shows that they went to Poona without any intimation, that they had decided to meet her alone, that they thought that they could persuade her in a few minutes' time to come back to the appellant, and that, therefore, when they' left for Poona they did not make any arrangements for the next day, for they expected to return back by the midnight train. This evidence is attacked on many grounds. It is said that Dr. Lulla is a friend of the appellant and, therefore, he went to him in getting rid of his wife as the appellant was not happy with her. It is pointed out that if this incident had happened, this would have been mentioned in the earlier correspondence, in the notice issued and in the plaint filed. It is also argued that his entire evidence was artificial and appears to be improvised for the occasion, for the way he went about the business appears to be very casual. It is asked whether Dr. Lulla, who was going on a serious attempt of reconciliation, would go to Poona without the appellant informing the respondent or her father that they were coming if his intention was to meet her alone, how did he expect that her parents would not be there when he went? And how did he also think that the estrangement that was prolonged could have been put an end to in a few minutes? If he was serious about it as he pretends he was, he would have gone there with preparations for a stay of one or two days after making necessary arrangements in respect of his professional work. There is much to be said for this argument. I have come across in my experience highly respected persons lying, in the witness-box to help a friend or save one from a trouble. But the City Civil Judge accepted his evidence. The High Court says about his evidence thus:

"The learned trial judge appears to have been considerably impressed by the testimony of Dr. Lulla. He regarded Dr. Lulla as an independent person who was not likely 'to tell an untruth to support the case of the petitioner. The learned judge also took the view, having regard to the contradictory statements made by the opponent in her evidence that the testimony of the opponent was not reliable. Sitting in appeal it will be difficult or us to ignore the appreciation of evidence by the learned trial judge. It must, however, be observed that Dr. Lulla was deposing to an incident which took place about three years prior to the date on which he gave evidence, and he did not claim to remember the exact words in which the conversation took place between the petitioner and the opponent or between the petitioner and himself. Dr. Jethmqlani, who appears on behalf of the petitioner, does not seek to rely upon this meeting and the replies alleged to have been given by the opponent as furnishing a cause of action for founding a claim to relief for judicial separation. .. .. in the absence of evidence as to what precisely were the questions put to and the answers given by the opponent, it is difficult to hold, even on the view that there was in the month of May 1954 a meeting between the petitioner and Dr. Lulla on the one hand and the opponent on the other as alleged by the petitioner, that the opponent had in unmistakable terms informed the petitioner and Dr. Lulla that she had no desire to return at any time to the matrimonial home."

This finding appears to me to be couched in euphemistic terms. Though the learned judges were not inclined to disturb the finding of the learned trial judge that Dr. Lulla met the respondent along

with the appellant, they were not willing to accept his evidence that she told them that she would not return to the matrimonial home for ever. I feel a real doubt whether the appellant and Dr. Lulla met the respondent at all. But let me assume for the purpose of this case, as the High Court was inclined to assume, that they went there. But Dr. Lulla admits in his evidence that he did not remember the exact words used by the respondent in speaking to the appellant; if so, he could not have also remembered the exact words used by her in answering the appellant's question. Afterall the emphasis is on the solitary word "ever". The witness was speaking to an incident that took place about 3 years before he gave evidence and in respect of a conversation that took place for a few minutes. It is not advisable to rely upon his memory in regard to the words alleged to have been used by the respondent, particularly when he comes to give evidence on behalf of a friend when the tendency would be to give the necessary twist to a conversion of which one could not remember the exact words. The High Court as Well as the learned Advocate, who appeared for the appellant in the High Court, did not, rightly, rely upon the phraseology used in the alleged conversation between the appellant and the respondent. Even if the incident had taken place, it fits in with my earlier finding, namely, -that the respondent's father had taken the permission of the appellant's parents, though given with reluctance. The appellant might have had second thoughts and intended to go back on the consent and to persuade the respondent to come back to his home and not leave India. With that intention he might have taken his friend Dr. Lulla to Poona, where the respondent was living. She might have refused to return as the appellant was going back on his consent. She must have been obviously very angry and must have curtly refused to come back. Even if she had used the word "ever"-which I believe is only a gloss added to her statement intentionally or by lapse of memory-it must have been said in a huff. If every statement made by a spouse in a huff in a short conversation with her husband were taken in its face value, many a home would be broken. I cannot, therefore, give any value to the evidence of Dr. Lulla. I would hold that it is very doubtful whether this incident had taken place, that even if it did, the evidence given by Dr. Lulla could not be taken to be a reproduction of the actual words used by the respondent, and that, even if she had used those words, it was only a statement made in a huff in a short interview and could not be taken as a final word on the subject as to compel a court to hold that she deserted her husband without reasonable cause.

Some emphasis is also made on her conduct in not meeting her husband or his.parents when she came to Bombay to board the ship and also on her not giving her husband's house as the address in the relevant papers prepared for the journey. It was argued that the place where she was staying at Bombay was very near to that of her husband and it is unthinkable that she would not have gone there, if she was going abroad with permission, to see her husband or his parents or her child. This argument misses the real point. Here we are considering the case of a wife who was ill-treated in her husband's house and who, at the instance of her father and his friend, got reluctant permission from her husband and parents-in-law and if Dr. Lulla's evidence were true, the appellant went back on his consent and was trying to prevent her from going with her father. In such a situation it is impossible to expect an unfortunate woman like the respondent to create more unpleasantness to herself by going to her husband's house before departure and to take the risk of spoiling her planned holiday. The fact that her husband's address was not given in the relevant travel papers could not be attributed to her, for they must have been prepared in usual course at the instance of the gentleman who was helping them in that regard. If once it was accepted that she deserted her husband permanently, these circumstances may have relevance, but once it was conceded that she was going with the permission of her husband, though unwillingly given, this conduct would fall in a piece with the respondent's case. I would, therefore, not give much value to such circumstances in the situation in which the respondent

was placed. The respondent left Bombay on July 7, 1954, for the Far East with her father. Much was made about her leaving India with her father. IF she had eloped with a stranger, no doubt that would be a different matter. But here a father was taking his daughter to give her a holiday so that she may improve her health. By taking her away for short time from the oppressive surroundings which affected her health,I do not see any justification for the comment that she had deserted her husband. It must also be remembered that the respondent's father was not living with his family in the Far East. His wife and children have all along been in India. He was taking the respondent only for a temporary sojourn; and what is wrong in a father taking his daughter for a holiday in those circumstances ? If he had taken the appellant's or his parents' consent, it was not suggested that there was anything wrong in her so going. If lie or his daughter did not take such a consent, it might be an improper or an inadvisable thing to do. But such a conduct in the case of a wife leaving with her father temporarily to a foreign country as an escape from an oppressive atmosphere cannot be described as reprehensible even by a Hindu society; much less can it be treated as a desertion. It was a natural reaction to an extraordinary situation. She might have known that her conduct would anger her husband, but she would not have thought that it would be a permanent obstacle in their relationship. Be it as it may, I have already found that she left with her father with the consent of the appellant and his father, and that even if the appellant subsequently retracted from his consent, her departure might be only improper, but could not conceivably amount to legal desertion.

Till now I was considering only the oral evidence. But hereafter we come across unimpeachable documentary evidence which shows the attitude of the couple to each other. I shall proceed to consider the documentary evidence on the assumption favourable to the appellant, namely, that he, along with Dr. Lulla, went to Poona in May 1954, retracted his permission given earlier, and persuaded her to come back to the matrimonial home, but she refused to do so and left with her father for foreign Countries.

I am definitely of the view that in -,he circumstances narrated above the exact words used by her could not be field to have been proved by the vague oral evidence of Dr. Lulla and that, even if she had expressed herself strongly in a buff, such expression could not in the circumstances be considered to be decisive of her determination to leave the matrimonial home for ever. She left for the Far East on July 7, 1954. Within a fortnight from that date, on July 20, 1954, the appellant gave a cable to the respondent to the following effect "Extremely surprised at your suddenly secretly leaving India without my knowledge and consent return immediately first plane."

On July 22/23, 1954, as soon as the respondent received the cable from the appellant, she gave a cable in reply thus "Returning within few months".

On July 24, 1954, the appellant gave another cable to the respondent to the following effect :

"You must return immediately."

Pausing here for a moment, let me recapitulate the position. If the respondent definitely told the appellant and Dr. Lulla that she bad given him up and that she would not return to the matrimonial home, why did the appellant send a cable telling her that he was surprised at her secretly leaving India and asking her to return immediately? And why did she reply that she would return in a few months?. The cable given by the appellant is more consistent with the fact that neither of them understood that she had left him for ever. Indeed, the cable reflected his anger on her departure along with her father, because, though permission was given earlier, he did not like her to go. Whatever ambiguity there may be, her immediate reply was inconsistent with her determination to leave him for ever, unless

we assume, as we are asked to do, that the cable 'was a link in the chain of the plan conceived by her and her father to resist an action that might be taken by the. husband in a court of law. In July 1954 what was the action which the appellant could have taken and what was the defence, if such an action was taken, that could be sustained on the basis of this cable? At that time the Act was not passed. The Act was passed in 1955 and came into force on May 18, 1955. Therefore, the only action which the husband could have taken 'Linder the law, as it then stood, was to file a suit for restitution of conjugal rights, and this cable could not possibly be a defence against such an action. If she wanted to join him again she could have submitted to the decree. The Bombay Hindu Divorce Act, 1947, may not have any extra-territorial operation. Even if it has, four years of desertion had to run out before she could be divorced; and there was no particular urgency for her to create any eviedence at that stage. To may this cable is destructive of tile case of the appellant that she left him for ever. His reply cable also is only consistent with the fact that there was no break between them.

Now, I come to a letter dated August 2, 1954, over which there is some controversy, the appellant alleging that it was a forged one and the respondent stating that it was ,a draft of the letter she sent to her husband. It reads " My dear husband, Darling I received your two telegrams, copies of which enclosed herewith.

I immediately cabled you that I shall be returning within few months, however I really feel surprised why you want me return to Bombay by first plane without any reason.

Dear I was particularly pained to read that I have suddenly and secretely left the place without your consent. What has prompted you to write this I really don't understand. Dear how came this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I (10 not like to discuss here since you are fully aware of it. It was you who suggested that I should go over and stay at my father's place and it was at your suggestion that I did so.

You were fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent As soon as I feel better I shall return to Bombay.

1 hope yourself, Ashok and all the other family members are 0. K. Give my loves to Ashok and Best regards to Mother and Father. Yours forever, Meena."

The respondent, in her examination-in-chief, says:-

"I had written a letter dated 2nd August 1954 to my husband, a copy whereof has been preserved by me, I produce the copy of the letter dated 2nd August 1954."

That was not objected to and the copy of the letter was put in and marked as Ex. No. 4. In the cross-examination there is some confusion, but she broadly stated that her father dictated to her the letter, that the said letter was typed, that she copied from that typed letter and that Ex. 4 is that typed letter. The father in his cross-examination, deposes that the respondent had written a letter dated August 2, 1954, to the appellant, that he had a draft of that letter and the same was written after consulting him. The appellant denied that he received that letter. The learned City Civil Judge found thus :-

"I am not prepared to hold that the copy letter Ex. 4 was fabricated subsequently, because there are references to the letter dated 2-8-1954 in subsequent letters addressed by the respondent to the petitioner."

But he held that the appellant did not receive such a letter. The trial Court held that the letter not being a copy of what was written the respondent to the appellant, it could not be regarded is a secondary

evidence of the contents of the letter. But the High Court pointed out that it was not the case of the respondent that it was a secondary evidence of the contents of the letter written by her, but her case was that the text of Ex. 4 and the letter written to the appellant was the same; and in support of her case she produced the letter from which she had copied out the letter she had addressed to the appellant. Both the Courts, therefore, held that Ex. 4 was the typed letter from which the respondent drafted her letter to her husband. Undoubtedly, Ex. 4 cannot be a secondary evidence of the letter written by the respondent to her husband, but it certainly corroborates her oral evidence that she wrote a letter with similar recitals contained in Ex. 4 to her hus-

band on the date Ex. 4 bears. As pointed out by the learned City Civil Judge as well as by the High Court, the subsequent letters written by her clearly demonstrate that Ex. 4 could not have been fabricated subsequently and a letter must have been written by her on August 2, 1954. In view of the concurrent findings of fact, I do not think it is necessary to consider the evidence over again. I accept the concurrent findings that a letter dated August 2, 1954, with contents similiar to those in Ex. 4 was written by the respondent to her husband.

It is contended that the said letter was written at the instance of the father and on his dictation to furnish evidence in an action that might be brought by the appellant against there spondent. Let me first take the comment,VI . Z., would a wife write a letter to her husband in consultation with her father? Ordinarily in the case of married couples it is true that a wife would not write letters to her husband after consulting her father. But the circumstances under which the respondent wrote letter were not ordinary ones. Here, there was trouble between the husband and wife. The husband, according to the respondent, gave his consent, though reluctantly, for her to leave with her father to the Far East, but soon there-after gave two cables asking her to return immediately. Naturally she would tell that fact to her father and seek his advice in the matter ofreplying to her husband. There is nothing wrong in her father helping her to send a suitable reply, so that the husband may not be offended. The second comment, namely, that this 'letter was intended to be a shield against a possible action by the appellant, is devoid of merits. At the time the letter was written the Act had not come into force and this letter could not have been an answer to a possible action the husband might take for restitution of conjugal rights. There was no particular urgency for her to create evidence on that date against a possible action under the Bombay Act, even if it applied to her. This letter demonstrates beyond any reasonable doubt that the wife did not desert her husband with the requisite animus, but, on the other hand, shows her willingness to go over to Bombay as soon as she regained her health. To this letter no reply was sent by the appellant and he says in his evidence that he did not receive the said letter. It is very difficult to believe Ms statement. He is obviously denying the receipt of this .letter a,,; it establishes that she had not the animus to desert him. On February 24, 1955, he again gave a cable in the following terms --

"Since your secret departure you not replying my telegrams letters myself shocked you wandering different countries leading reckless life spoiling my reputation your most disgraceful behaviour ruining my life."

This cable contains incorrect statements. Whether he received the letter dated August 2, 1954, or not, admittedly he had received the cable given by her. I have already held that he must have received the letter dated August 2, 1954. He imputes to her in this cable reckless life and disgraceful behaviour. Where did he get this information that she was leading a bad life? In his evidence he does not say that she was leading any disgraceful life. There is nothing on the record to show that the respondent was leading a bad life, and indeed the appellant admits that she was not even leading a fast one, she never

danced, played cards or drank, at any rate, according to the appellant, from the year 1947. This cable must have irritated any respectable woman. Yet on February 26, 1955, she gave the following cable :-.

"Your allegation,% in your cable dated twenty fourth not correct cannot understand your attitude stop I have departed with your knowledge with my father because of falling health due to reasons you are well aware stop keeping quiet life with my parents stop have not received your letter only telegrams which have been replied by cable and letter."

This reply is in subdued terms and it shows her respectable attitude towards the appellant inspite of his provocation. Therein she denies his wild accusations and restates that she went with her father with his consent and that she had replied to Ms cables by cables as well as by letter. On March 4, 1955, the appellant gave another cable to hercharging her with fabricating false stories. On March 3, 1955, before the respondent received the above cable, she wrote a letter to the appellant giving a detailed reply to his cables. Therein she denied that she was leading any reck-

26-2 S.C. India/64 less life and told him that she was either with her father or uncle and also that she did not receive any letters from him. Then she proceeded to state :-

You know darling I being away from the people who despise me, I have improved my health considerably, I wish you could come and meet me her outside that suspicious atmosphere and you will know the real pleasure. I am very lonely without you and my son Ashok who is always with me in my sleep. I long to see both of you and therefore I beg to come out here.. Please do come and do not disappoint me. You know in your heart that I love you so much. This trip outside India will make you good and we shall have a very happy life. You are working so hard for your parents and never think of me and your health which as I know is deteriorating and I also know that you are not happy. Darling, I assure you that this change for few months will improve your health considerably. You need good rest to think on all your problems of daily life which you can do only along and outside the influence of the people who are around you. I hope you will understand and at least come out here for a change-for a short period. I shall do what you want me to do, but please, darling, do come; Please give my Charanawandana to father and mother and love to Ashok."

This letter is criticized on the ground that it was another attempt to create evidence at the instance of her father and also on the ground that she asked her husband to come away from his parents. To me this letter appears to be an honest attempt on the part of the wife to reconcile with her husband. It mentions his troubles and requests him to come over the East not for any permanent stay but only as a temporary sojourn to recoup his health and to enjoy a holiday along with her. As I have already stated, by that time the Act was not passed and therefore this letter could not have been written to set up any defence against any possible action by the husband. I find it very difficult to see any sinister motive in this well meant reply to her husband, and particularly after his cable attributing to her reckless life. After dispatching this letter she received a cable dated March 4, 1955, wherein the appellant attributed to her the conduct of fabricating false stories. To that cable she sent a reply cable on March 10, 1955, denying the said allegation and telling him that somebody was wrecking their lives and asking him to come over to Hongkong. On April 2, 1955, the appellant wrote a long letter to the respondent in reply to her letter dated March 3, 1955. Therein he chastised her for making insinuations against his parents, who had done much for her welfare and happiness. Emphasizing upon the word "pleasure" in her letter dated March 3, 1955, he proceeded to state :-

"'Pleasure'! that, indeed, is the crux of the whole problem. It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds."

Pursuing the same idea, he observed:-

"Just remember my efforts all these years to improve you and make you a happy and contented wife. It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone so far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife."

He did not stop with that, but proceeded to state "....you have proceeded to Hongkong and other places, in defiance of my clear instruction to return And, in order to cloak all these evil things you are now inventing dirty excuses, evidently meant for the consumption of the outside world whom you want to fool, so that you may be able to justify your disgraceful conduct and continue to live your life of "pleasure" without let or hindrance."

What is more, he told her that in her letters she had fabricated false and malicious stories to cover up her outrageous conduct for misleading the outside world. He finally ended with the following words expressing his determination to ignore her further correspondence:-

"However, if you still choose to fling further filth in my face by writing to me such letters and telegrams, I shall have no choice but to ignore and make no reply to the same. Inspite of all my efforts, you have completely deserted me and chosen the path of pleasure and per-version at any cost. You are only looking for same cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn in your game."

There is considerable argument on the import of this letter. On behalf of the appellant it is contented that the contents of this letter were nothing more than an emotional outburst of a deserted husband and that the words used therein should not be understood literally. It is argued on behalf of the respondent that this letter did not mince matters in attributing infidelity and unchastity to the respondent and it communicated a final determination on his part not to have anything to do with her. The former argument was accepted by the City Civil Court, but the latter contention had the approval of the High Court. Shah, J., after reading the relevant portions of the document, came to the following conclusion:-

Whatever may be the protestations made by the petitioner in his evidence before the Court, it is impossible to accede to the contention of Mr. Jethmalani that his letter was merely the outpouring of an anguished heart. The letter in no unmistakable terms charges the opponent with infidelity not occasional but a persistent and chosen life of infidelity-and also charges with inventing a scheme whereby she may be able to live that life of infidelity under an appearance of being respectfuly married. If after this letter the opponent was unwilling to carry out the petitioner's direction and to forthwith go and live with him, in our judgment, no fault can be found with her."

Deasi, J., in his separate judgment wholly agreed with Shah, J. Theappellant is a graduate and it cannot be said that he does not know English. The terms of the letter indicate that his standard of English is rather high and he has sufficient vocabulary at Ms command. It is not necessary to cover the ground overagain, as I entirely agree with the construction laced upon that letter by Shah and Deasi, JJ. The expressions "outrageous conduct" reckless life", "wild ventures", disgustful conduct", "life of pleasure",

"past links", "relations readily available at every port" and such others found in the letter leave no room to doubt that the said expressions were intended to impute an immoral and dissipated life to her. Whether he used those words really believeing that. she was such a bad woman or whether he used the wild language because he was angry that she went with her father need not be speculated upon. What matters is that he designedly couched his letter without leaving any room for doubt in clear and precise phraseology and told her that she was a bad woman and, therefore, he had nothing more to do with her. To such an outrageous letter, how did the respondent react? She must have been extremely offended as any self-respecting woman would be. But she controlled herself and replied to him by letter dated April 12, 1955 in a subdued and dignified manner. After repeating that the appellant and his parents gave her consent to leave with her father, she again repeated that she left with her father to improve her health. She told him that her health improved a little and that she would return to him and to her son after sometime. Adverting to his fulminations in his letter she said :

"I find it unnecessary to reply to the other unfounded accusations contained in your letter because I know and I am sure that the basis of the same are your hallucinations, of what I am not. I deny your charges all over again and you know that they are not true. I believe that the best way is to ignore them since they are not based on truth."

She ended her letter thus :

"Please do not indulge in misgivings. As soon as my health has completely improved, I shall of course, come back home to you and to our son. "

This letter shows that she was very much offended and she was also sorry. She told him in mild words that all his accusations were false and requested him not to indulge in such things. She promised to come as soon as her health improved. Here the arguments advanced by learned counsel for the appellant may be noticed.

Firstly, the usual argument, namely, that this letter was written to the dictation of her father as a shield against a possible action by the appellant, is repeated ; and secondly, this letter indicates that the false accusations made by her husband did not so operate on her mind as to induce her to give up her idea of coming back to him. The first argument calls for the same answer, which I have given in the context of other correspondence. There is nothing wrong in the respondent consulting her father, who any day was more affectionate to her than the appellant could possibly have been. There is no point in the second contention. This letter clearly shows that she was highly offended by the false accusations ; but she replied in a dignified manner asking him neither to make nor to believe such accusations. She should be unusual woman if she was not offended by this letter. This reply reflects more her selfcontrol than her indifference or insensitiveness. This letter, read along with the letter written by the appellant on April 2, 1955, demonstrates that she was always ready and willing to come back to him inspite of his accusations. Some comment is made on the basis of the answers she gave in her evidence in regard to the manner she got the contents explained to her. Those answers were given in the stress of cross-examination. Those could not possibly detract from the admitted facts that she received the said letter and gave her reply. The letter and her answers speak for themselves. The ingenuity of the cross-examining counsel could not add to or detract from either. So far as the letters go, they proved beyond reasonable doubt that however inadvisable it may be for the respondent to go to the Far East with her father, she had not the least intention of leaving her husband permanently. She was always ready and willing to go back to her husband.

On April 8, 1956, the respondent returned to India. The appellant's complaint is that she did not inform him that she was coming and that she did not come to his house. The contention on behalf of the respondent is that after she received the letter dated April 2, 1955, she was highly offended and that, therefore, she expected some step on the part of her husband to meet her or send somebody to take her to his home. In her evidence she says that after she arrived in India, her father spoke to two or three persons for rapprochement and one of them was Kishinchand of Messers. J. Kimatrai and Kundanmal and that her father told her that Kishinchand had a talk with the appellant, but the latter refused to take her back. She adds that after her return no efforts were made either by her husband or on his behalf or by his parents to call her back to his house and she thought that somebody would be sent by her husband to fetch her from Poona to Bombay according to the custom. The appellant admits in his evidence that sometime in the month of May or June 1955 he came to know that the Tespondent had returned to India. Assuming that he was speaking the truth, it is clear from the evidence that he knew of her return about a month after she returned, but presumably he was standing on his rights and prestige and did not move in the matter. It is suggested to her that instead of going to her husband's house, in April 1956 she went to Kashmir for a holiday. She admits that she went, but explains that her father's brother's children had holidays and as they proceeded to Kashmir, she also accompanied them. I do not see any bearing of this Kashmir trip on the question of desertion. If she was waiting for an invitation to go to her husband's place there is nothing wrong in her accompanying the children to Kashmir. The respondent's father says that about 2 months after their arrival in India, he waited for an invitation from the appellant, but as he did not move in the matter, he met one or two friends of his to bring about a rapprochement between the couple, but they could not do anything in the matter. There is nothing unnatural in the father making the said attempts to bring about reconciliation between the couple. There is no reason to reject his evidence in this regard. I shall assume that no mediators were sent by the respondent's father to, bring about a rapprochement between the couple. Even so, after the letter dated April 2, 1955 the husband, who knew that the respondent had come to India, should have taken some steps directly or indirectly to induce her to come to his house. If he stood on his prestige, the respondent could not be blamed, if after the rebuffs she received and the adment attitude of the appellant communicated to her in the said letter, she did not take the first step. In this context another circumstance may also be noticed. The respondent and also her father say that in November 1955, a sister of the appellant was married but no invitation was sent to the respondent. The respondent says that this fact also made her to apprehend that she would not be received if she straightaway went to the appellant's house. In the circumstances if she did not directly on landing in India go to her husband's house but waited for an invitation from him, I cannot say that her attitude was either unreasonable or that it should be attributed to her final determination to desert her husband. On this aspect of the case, Shah, J., observed in his judgment :

"The conduct of the opponent in not meeting her son after she returned to India may appear to be unnatural, but, if after receiving a highly offensive letter from the petitioner, she did not take an initiative to return to the matrimonial home and waited for some invitation from, or from some amends on the part of, the petitioner, that conduct may not be regarded as improbable or justifying an' inference that she was seeking to continue the state of desertion which had previously started."

I am in entire agreement with these observations. On the other hand the conduct of the appellant is telltale and reflects his determination to discard her. According to him he came to know that the respondent came to India in April or May 1956, but a few days thereafter instead of inviting her to come, he went to a lawyer for consultation and thereafter filed the petition for judicial separation in

September 1956. It is manifest that he was waiting for the statutory time to run out and soon thereafter he rushed to the Court. The respondent, who obviously did not know the passing of the Act, fell into his trap.

Pausing here, let me summarize the facts. The respondent belongs to a fairly rich family. She must have been brought up in comfort and with love and affection. She was not highly educated ; she has read, we are told, upto sixth standard. She was married to the appellant, who belongs to a well-to-do family. The appellant is an M.B.B.S. and has been carrying on the profession of a doctor in Bombay. After the marriage, the respondent came to live in the joint family house of the appellant in 1947. There were misunderstanding between the parents of the respondent and the appellant and the latter's sisters. The respondent was ill-treated, insulted and was not even allowed to look after her only child. The husband, for one reason or other, either because of his respect for his parents or because of his weakness or because of both, though at the beginning he was affectionate to his wife, was not able to stand up for her and later on he fell in line with his parents and sisters and began to ill-treat her. Though in the earlier years she was allowed to go to her parents' house now and then, later on the appellant and his parents refused her permission to go to her parents' house or allowed her to do so once in a while with great reluctance, when her father, on one of his infrequent visits, was in India. She was not even permitted to go when her uncle died. The appellant also contemplated a second marriage, but, for one reason or other, it did not come off. By the year 1954 she was in a nervous strain and necessarily that must have affected her health. Her father, who came to India at the end of 1953, heard her complaints and saw her physical and mental condition. He did what a loving father should do in the circumstances. Giving up the ideas of false prestige, he approached the parents of the appellant directly and through a friend and persuaded them to permit the respondent to go to his house and thereafter to the Far East with him for a short stay to recoup her health. The respondent also took the permission of her husband. After some time, the husband I am assuming that his version of the visit along with Dr. Lulla, to Poona was true-changed his mind and asked her to come back, but she refused to come back. From her standpoint she obviously did not like her husband going back on his word and disturbing her planned holiday, to which she was looking forward. From the standpoint of the husband, he was angry because as, a Hindu husband he expected his wife to obey him whether his demand was reasonable or not. The wife, perhaps' did not tell him the day when she would be leaving with her father to the Far East. She must have been afraid that he would prevent her somehow from going abroad. That explains her conduct in not seeing him or his parents at Bombay before she boarded the ship. The subsequent correspondence shows that the appellant was telling her from his commanding position that she should give up her holiday and come back to him immediately and she, on her part, was persuading him in a subdued tone to permit her to stay for a few months and promising to come back thereafter. The letter dated April 2, 1955, was an unexpected and unmerited blow to her. Therein she was charged with unchastity and leading a fast and reckless life. Even a Hindu wife would be enraged and insulted by such dastardly conduct on the part of her husband. Even so she sent a reply couched in a dignified and controlled language denying his allegations and stating that she would return in a few months. She was not even invited by the appellant when his sister was married in November 1955. She therefore, came back to India only in April 1956. In view of the serious allegations made by the appellant in his letter dated April 2, 1954, and in view of his determined attitude disclosed therein, she naturally and properly expected that the husband would invite her or send somebody to take her back to his home. Instead of doing so, though he knew that the respondent had come to India, he did not make any attempt to invite her or send a relation to bring her to his home as he used to do on previous occasions when she went to her father's house. By that time as the Act came into force, he

found his opportunity for which he was waiting and took advantage of the situation. As the statutory period of two years had expired from the date she left India, he rushed to the Court. On these facts, I have no doubt that the appellant failed to establish that the respondent deserted him without any reasonable cause. Even if she deserted him within the meaning of s. 10 of the Act, I would hold that by writing the letter dated April 2, 1955, she ceased to be in desertion from that date. A fair reading of that letter, read in the context of her offer to return within a few months, shows beyond any doubt that he closed the door for her return long before the statutory period had expired. When the respondent wrote to the appellant telling him that she would come in a few months, he wrote to her saying that she was leading an immoral life and that he would no longer be "drawn into her game." Even after that letter, she wrote back denying his charges and promising to come as soon as her health improved. I have no doubt that, at any rate from April 2, 1955, the desertion, if any, on the part of the respondent, came to an end and from that date the appellant was guilty of desertion.

For the aforesaid reasons, I agree with the conclusion arrived at by the High Court. The appeal deserves to be dismissed and I accordingly dismiss it with costs.

ORDER OF COURT In accordance with the majority opinion, the appeal is allowed with costs here and in the High Court.

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BIPIN CHANDER JAISINGHBHAI SHAH VS PRABHAWATI

Equivalent Citations: 1956 Scr 838
Date of Judgment: 19/10/1956

1957 AIR 176

Bipin Chander Jaisinghbhai Shah
Vs.
Prabhawati.

(Before Hon'ble Mr. Justice Bhuvneshwar P. Sinha, Hon'ble Mr. Justice B. Jagannadhadas & Hon'ble Mr. Justice T.L. Venkatarama Aiyyar, JJ.)

HMA-section 13- divorce- ground of desertion - For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely

(1) the factum of separation, and

(2) the intention to bring cohabitation permanently to an end (animus deserendi).

Similarly two elements are essential so far as the deserted spouse is concerned:

(1) the absence of consent, and

(2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively....

Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus deserendi coincide in point of time.

JUDGMENT

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 247 of 1953. Appeal by special leave from the judgment and decree dated August 22, 1952 of the Bombay High Court in Appeal No. 66 of 1952 arising out of the decree dated March 7, 1952 of Bombay High Court in its Ordinary Original Civil Jurisdiction in Suit No. 1177 of 1951.

M. C. Setalvad, Attorney-General for India, Purshottam Tricumdas, T. Godiwala, J. B. Dadachanji, Rameshwar Nath and S. N. Andley, for the appellant.

C. K. Daphtary, Solicitor-General of India and Sardar Bahadur, for the respondent.

1956, October 19. The Judgment of the Court was delivered by

SINHA J.-This is an appeal by special leave against the judgment and decree of the High Court of Judicature at Bombay dated August 22,1952, reversing those of a single Judge of that Court on the Original Side, dated March 7,1952, by which he had granted a decree for dissolution of marriage between the appellant and the respondent.

The facts and circumstances of this case may be stated as follows: The appellant, who was the plaintiff, and the respondent were married at Patan on April 20, 1942, according to Hindu rites of the Jain Community. The families of both the parties belong to Patan, which is a town in Gujarat, about a night's rail journey from Bombay. They lived in Bombay in a two-room flat which was in occupation of the appellant's family consisting of his parents and his two sisters, who occupied the larger room called the hall, and the plaintiff and the defendant who occupied the smaller room called the kitchen. The appellant's mother who is a patient of asthma lived mostly at Patan. There is an issue of the marriage, a son named Kirit, born on September 10, 1945. The defendant's parents lived mostly at Jaigaon in the East Khandesh district in Bombay. The parties appear to have lived happily in Bombay until a third party named Mahendra, a friend of the family came upon the scene and began to live with the family in their Bombay flat some time in 1946, after his discharge from the army. On January 8, 1947, the appellant left for England on business. It was the plaintiff's case that during his absence from Bombay the defendant became intimate with the said Mahendra and when she went to Patan after the plaintiff's departure for England she carried on "amorous correspondence" with Mahendra who continued to stay with the plaintiff's family in Bombay. One of the letters written by the defendant to Mahendra while staying at the plaintiff's flat in Bombay, is Ex. E as officially translated in English, the original being in Gujerati except a few words written in faulty English. This letter is dated April,1947, written from the plaintiff's house at Patan, where the defendant bad been staying with her mother-in-law. This letter had been annexed to the plaint with the official translation. It was denied by the defendant in her written statement. But at the trial her counsel admitted it to have been written by her to Mahendra. As this letter started all the trouble between the parties to this litigation, it will have to be set out in extenso hereinafter. Continuing the plaintiff's narrative of the events as alleged in the plaint and in his evidence, the plaintiff returned to Bombay from abroadon May 20, 1947. To receive him back from his foreign journey the whole family' including the defendant was there in Bombay. According to the plaintiff, he found that on the first night after his return his bed had been made in the hall occupied by his father and that night he slept away from his wife. As this incident is said to have some significance in the narrative of events leading up to the separation between the husband and the wife and about the reason for which the parties differ, it will have to be examined in detail later. Next morning, that is to say, on May 21, 1947, the plaintiff's father handed over the letter aforesaid to the plaintiff, who recognised it as being in the familiar handwriting of his wife. He decided to tackle his wife with reference to the letter. He handed it to a photographer to have photo copies made of the same. That very day in the evening he asked his wife as to why she had addressed the letter to Mahendra. She at first denied having written any letter and asked to see the letter upon which the plaintiff informed her that it was with the photographer with a view to photo copies being made. After receiving the letter and the photo copies from the photographer on May 23, the plaintiff showed the defendant the photo copy of the letter in controversy between them at that stage and then the defendant is alleged to have admitted having written the letter to Mahendra and to have further told the plaintiff that Mahendra was a better man than him and that Mahendra loved her and she loved him. The next important event in the narrative is what happened on May 24, 1947. On the morning of that day, while the plaintiff

was getting ready to go to his business office his wife is alleged to have told him that she had packed her luggage and was ready to go to Jalgaon on the ostensible ground that there was a marriage in her father's family. The plaintiff told her that if she had made up her mind to go, he would send the car to take her to the station and offered to pay her Rs. 100 for her expenses. But she refused the offer. She left Bombay apparently in the plaintiff's absence for Jalgaon by the afternoon train. when the plaintiff came back home from his office, he "discovered that she had taken away everything with her and had left nothing behind". It may be added here that the plaintiff's mother had left for Patan with his son some days previously. Plaintiff 's case further is that the defendant never came back to Bombay to live with him, nor did she write any letters from Jalgaon, where she stayed most of the time. It appears further that the plaintiff took a very hasty, 'if not also a foolish, step of having a letter addressed to the defendant by his solicitor on July 15, 1947, charging her with intimacy between herself and Mahendra and asking her to send back the little boy. ,The parties violently differ on the intent and effect of this letter which will have to be set out in extenso at the appropriate place. No answer to this letter was received by the plaintiff. In November, 1947, the plaintiff's mother came from Patan to Bombay and informed the plaintiff that the defendant might be expected in Bombay a few days later. Thereupon the plaintiff sent a telegram to his father-in-law at Patan. The telegram is worded as follows:-

"Must not send Prabha. Letter posted.

Wishing happy new year".

The telegram stated that a letter bad been posted. The defendant denied that any such letter bad been received by her or by her father. Hence the original, if any, is not on the record. But the plaintiff produced what he alleged to be a carbon copy of that letter which purports to have been written on November 13, 1947, the date on which the telegram was despatched. An English translation of that letter is Ex. C and is to the following effect:-

Bombay 13-11-47 To Rajmanya Rajeshri Seth Popatlal & others. There is no letter from you recently. You must have received the telegram sent by me today.

Further, this is to inform you that I have received information from my Mami (mother) thatPrabha is going to come to Bombay in 3 or 4 days. I am surprised to hear this news; Ever since she has gone to Jalgaon, there has been not a single letter from her to this day. Not only that, but, although you know everything, neither you nor any one on your behalf has come to see me in this connection. What has made Prabha thus inclined to come all of a sudden! After her behaviour while going to Jalgaon for: the marriage, (and after), her letter to Mahendra and her words. 'He is better than you-Has feeling for' me and I love him' and all this, I was afraid that she would not set up a house with me. Hence when my mother gave me the news of her return, I was surprised.

I have not the slightest objection to the return of Prabha, but if she gives such shameless replies to me and shows such improper behaviour, I shall not be able to tolerate the same. If she now really realises her mistake and if she is really repenting and wants sincerely to come, please make her write a reply to this letter. On getting a letter from her, I shall personally come to Patan to fetch her. Kirit is young. For his sake also, it is necessary to persuade Prabha.

Further, I have to state that I have so far kept peace. I have made efforts to call back Prabha. Please understand this to her my final effort. If even now Prabha does not give up her obstinacy, I am not responsible and (then) do not blame me.

Well, that is all for the present. Kirit must be bale and hearty. My new year's greetings to you all. Please do assign to me such work-as I can manage.

Written by Bipinchandra"

The plaintiff stated that be received no answer either to the telegram or to the letter. Two days later, on, November 15, the plaintiff's father addressed a letter to the defendant's father, which is Ex. D. This letter makes reference. to the defendant's mother having, talked to the plaintiffs mother about sending the defendant I to Bombay and to the fact that the plaintiff bad sent a telegram on November 13, and ends with the expression of opinion by the plaintiff's father that it was "absolutely necessary" that the plaintiff's consent should be obtained before sending the defendant to Bombay. This letter also remained unanswered. According to the plaintiff, nothing happened until May, 1948, when he went to Patan and there met the defendant and told her "that if she repented for her relations with Mahendra in the interests of the child as well as our own interests she could come back and live with me". To that the defendant is said to have replied that in November, 1947, as a result of pressure from her father and the community, she had-been thinking of coming to live with the plaintiff) but that she had then decided not to do so. The defendant has given quite a different version of this interview. The second interview between the plaintiff and the defendant again took place at Patan some time later in 1948 when the plaintiff went there to see her on coming to know that she had been suffering from typhoid,. At that time also she evinced no desire to come back to the plaintiff. The third and the last interview between the plaintiff and the defendant took place at Jalgaon in April-May, 1949. At that interview also the defendant turned down the plaintiff's request that at least in the interests of the child she should come back to him. According to the plaintiff, since May 24, 1947, when the defendant left his home in Bombay of her own accord, she bad not come back to her marital home. The suit was commenced by the plaintiff by filing the plaint dated July 4, 1951, substantially on the ground that the defendant bad been in desertion ever since May 24, 1947, without reasonable cause and without his consent and against his will for a period of over four years. He therefore prayed for a decree for a dissolution of his marriage with the defendant and for the custody of the minor child.

The suit was contested by the defendant by a written statement filed on February 4, 1952, substantially on the ground that it was the plaintiff who by his treatment of her after his return from England had made her life unbearable and compelled her to leave her marital home against her wishes on or about May 24, 1.947. She denied any intimacy between herself and Mahendra or that she was confronted by the plaintiff with a photostat copy of the letter., Ex. E, or that she had confessed any such intimacy to the plaintiff. She admitted having received the Attorney's letter, Ex. A, and also that she did not reply to that letter. She adduced her father's advice as the reason for not sending any answer to that letter. She added that her paternal uncle Bhogilal (since deceased) and his son Babubhai saw the plaintiff in Bombay at the instance of the defendant and her father and that the plaintiff turned down their request for taking her back. She also made reference to the negotiations between the defendant's mother and the plaintiff's mother to take the defendant back to Bombay and that the defendant could not go to Bombay as a result of the telegram of November 13, 1947, and the plaintiff's father's letter of November 15, 1947, aforesaid. She also stated that the defendant and her son, Kirit, both lived with,the plaintiff's family at Patan for over four months and off and on on several occasions. The defendant's definite case is that she had always been ready and willing to go back to the plaintiff and that it was the plaintiff who all along had been wailfully refusing to keep her and to cohabit with her. On those allegations she resisted the plaintiff's claim for a decree for a dissolution of the marriage. On those pleadings a single issue was joined between the parties, namely,-

"Whether the defendant deserted the plaintiff for a continuous period of over four years prior to the filing of the suit".

At the trial held by Tendolkar, J. of the Bombay High Court on the Original Side, the plaintiff examined only himself in support of his case. The defendant examined herself, her father, Popatlal, and her cousin, Bhogilal, in support of her case that she had been all along ready and willing to go back to her marital home and that in spite of repeated efforts on her part through her relations the plaintiff had been persistently refusing to take her back.

The learned trial Judge answered the only issue in the case in the affirmative and granted a decree for divorce in favour of the plaintiff, but made DO order as to the costs of the suit. He held that the letter, Ex. E "reads like a love letter written by a girl to her paramour. The reference to both of them having been anxious about something and there being now no need to be anxious any more can only be to a possible fear that she might miss her monthly periods and her having got her monthly period thereafter, because, if it were not so and the reference was to anything innocent, there was nothing that she should have repented later on in her mind as she says she did, nor should there have been occasion for saying 'after all love is such an affair'." With reference to that letter he further held that it was capable of the interpretation that she had misbehaved with Mahendra and that she was conscious of her guilt. With reference to the incident of May 24, the learned Judge observed that having regard to the demeanour of the plaintiff and of the defendant in the witness box, he was inclined to prefer the husband's testimony to that of the wife in all matters in which there was a conflict. He held therefore that there was desertion with the necessary animus deserendi and that the defendant had failed to prove that she entertained a bonafide intention to come back to the marital home, that is to say, there was no animus revertendi. With reference to the contention that the solicitor's letter of July 15,1947, had terminated the desertion, if any, he held that it was not well founded inasmuch as the defendant had at no time a genuine desire to return to her husband. He made no reference to the prayer in the plaint that the custody of the child should be given to the father, perhaps because that prayer was not pressed. The defendant preferred an appeal under the Letters Patent which was heard by a. Division Bench consisting of Chagla C.J. and Bhagwati J. The Appellate Bench, allowed the appeal, set aside the decision of the trial Judge and dismissed the suit with costs. It held that the defendant was not guilty of desertion, that the letter of July 15, 1947, clearly established that it was the 'plaintiff who had deserted the defendant. Alternatively, the Appellate Court held that even assuming that the defendant was in desertion as a result of what had happened on May 24, and subsequently, the letter aforesaid bad the effect of putting an end to that desertion. In its judgment the letter, Ex. E, did not justify the plaintiff having any reasonable suspicions about his wife's guilt and that the oral evidence of the defendant and her relations proved the wife's anxiety to return back to her husband and of the obduracy of the husband in refusing to take the wife back. The plaintiff made an application to the High Court for leave to appeal to this Court. The leave asked for was refused by another Division Bench consisting of the Chief Justice and Dixit J. Thereafter the plaintiff moved this Court and obtained special leave to appeal from the judgment of the Appellate Bench of the High Court.

In this appeal the learned Attorney-General appearing on behalf of the appellant and the learned Solicitor-General appearing on behalf of the respondent have placed all relevant considerations of fact and law before us, and we are beholden to them for the great assistance they rendered to us in deciding this difficult case. The difficulty is enhanced by the fact that the two courts below have taken diametrically opposite views of the facts of the case which depend mostly upon oral testimony of the plaintiff-husband and the defendant-wife and not corroborated in many respects on either

side. It is a case of the husband's testimony alone on his side and the wife's testimony aided by that of her father and her cousin. As already indicated, the learned trial Judge was strongly in favour of preferring the husband's testimony to that of the wife whenever there was any conflict. But he made no reference to the testimony of the defendant's father and cousin which, if believed, would give an entirely different colour to the case. Before we deal with the points in controversy, it is convenient here to make certain general of observations on the history of the law on the subject and the well established general principles on which such cases are determined. The suit giving rise to this appeal is based on section 3(1) (d) of the Bombay Hindu Divorce Act', XXII of 1947, (which hereinafter will be referred to as "The Act") which came into force on May 12, 1947, the date the Governor's assent was published in the Bombay Government Gazette. This Act, so far as the Bombay Province, as it then was, was concerned, was the first step in revolutionizing the law of matrimonial relationship, and, as the Preamble shows, was meant "to provide for a right of divorce among all communities of Hindus in certain circumstances". Before the enactment, dissolution of a Hindu marriage particularly amongst what were called the regenerate classes was unknown to general Hindu law and was wholly inconsistent with the basic conception of a Hindu marriage as a sacrament, that is to say, a holy alliance for the performance of religious duties. According to the Shastras, marriage amongst the Hindus was the last of the ten sacraments enjoined by the Hindu religion for purification. Hence according to strict Hindu law as given by the Samhitas and as developed by the commentators, a Hindu marriage could not be dissolved on any-ground whatsoever, even on account of degradation in the hierarchy of castes or apostacy. But custom', particularly amongst the tribal and what used to be called the lower castes recognised divorce on rather easy terms. Such customs of divorce on easy terms have been in some instances held by the courts to be against public policy. The Act in section 3 sets out the grounds of divorce. It is noticeable that the Act does not recognise adultery simpliciter as one of the grounds of divorce, though cl. (f) renders the fact that a husband "has any other woman as a concubine" and that a wife "is a concubine of any other man or leads the life of a prostitute" a ground of divorce. In the present case we are immediately concerned with the provisions of s. 3(1)(d), which are in these terms:-

3. (1) A husband or wife may sue for divorce on any of the following grounds, namely:-

.....

(d) that the defendant has deserted the plaintiff for a continuous period of four years".

"Desertion" has been defined in section 2(b) in these terms:-

'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse". It will be seen that the definition is tautological and not very helpful and leads us to the Common Law of England where in spite of repeated legislation on the subject of matrimonial law, no attempt has been made to define "desertion". Hence a large body of case law has developed round the legal significance of "desertion". "Marriage" under the Act means "a marriage between Hindus whether contracted before or after the coming into operation of this Act". "Husband" means a Hindu husband and "wife" means a Hindu wife.

In England until 1858 the only remedy for desertion was a suit for restitution of conjugal rights. But by the Matrimonial Causes Act of 1857, desertion without cause for two years and upwards was made a ground for a suit for judicial separation. It was not till 1937 that by the Matrimonial Causes Act, 1937, desertion without cause for a period of three years immediately preceding the institution of proceedings was made a ground for divorce. The law has now been consolidated in the Matrimonial Causes Act, 1950 (14 Geo. VI, c. 25). It would thus appear that desertion as affording a cause of action

for a suit for dissolution of marriage is a recent growth even in England. What is desertion? "Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to on end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarised in paras. 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.) Vol. 12, in the following words:- "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. , The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or, where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion.' For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed

as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or-implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial some with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced,, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce' the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard, C.J. in the case of Lawson v. Lawson[1] may be referred to:-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution.....

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

In this connection the plaintiff in the witness box deposed to the incident of the night of May 20, 1947. He stated that at night he found that his bed had been made in the hall in which his father used to sleep, and on being questioned by him, the defendant told him that it was so done with a view to giving him the opportunity after a long absence in England to talk to his father. The plaintiff expressed his wish to the defendant that they should sleep in the same room as they used to before his departure for England, to which the wife replied that as the bed had already been made, "it would look indecent if they were removed". The plaintiff therefore slept in the hall that night. This incident was relied upon by the plaintiff with a view to showing that the wife had already made up her mind to stop cohabitation. This incident has not been admitted by the defendant in her cross-examination. On the other hand she would make it out that it was at the instance of the plaintiff that the bed had been made in the hall occu- pied by his father and that it was the plaintiff and not she who was responsible for their sleeping apart that night. As the learned trial Judge has preferred the plaintiff's testimony to that of the defendant on all matters on which there was simply oath against oath, we would not go behind that finding. This incident by itself is capable of an innocent explanation and therefore has to be viewed along with the other incidents deposed to by the plaintiff in order to prove his case of desertion by

1 [1955] 1 All E.R. 341, 342.

the defendant. There was no reason why the husband should have thought of sleeping apart from the wife because there was no suggestion in the record that the husband was aware till then of the alleged relationship between the defendant and Mahendra. But the wife may have been apprehensive that the plaintiff had known of her relations with Mahendra. That apprehension may have induced her to keep out of the plaintiff's way. The most important event which led to the ultimate rupture between the parties took place on May 21, 1947, when in the morning the plaintiff's father placed Mahendra's letter aforesaid in the plaintiff's hands. The letter which has rightly been pointed out in the courts below as the root case of the trouble is in its relevant parts in these terms:-

"Mahendrababu, Your letter has been received. I have read the same and have noted the contents. In the same way, I hope, you will take the trouble of writing me a letter now and then. I am writing, this letter with fear in my mind, because if this reaches anybody's hands, that cannot be said to be decent. What the mind feels has got to be constrained in the mind only. On the pretext of lulling (my) son to sleep, I have been sitting here in this attic, writing this letter to you. All others are chitchatting below. I am thinking now and then that I shall write this and shall write that. Just now my brain cannot go in any way. I do not feel like writing on the main point. The matters on which we were to remain anxious and you particularly were anxious, well we need not now be. I very much repented later on in my mind. But after all love is such an affair. (Love begets love).

..... "While yet busy doing services to my mother-in-law, the clock strikes twelve. At this time, I think of you and you only, and your portrait shoots up before my eyes. I am reminded of you every time. You write of coming, but just now there is nothing like a necessity, why unnecessarily waste money? And again nobody gets salvation at my bands and really nobody will. You know the natures of all. Many a time I get tired and keep on being uneasy in my mind, and in the end I weep and pray God and say, 0 Lord, kindly take me away soon: I am not obsessed by any kind of anxiety and so relieve me from this mundane existence. I do not know how many times I must be thinking of you every day....."

This letter is not signed by the defendant and in place of the signature the word "namaste" findsplace. The contents of the letter were put to the defendant in cross-examination. At that time it was no more a contested document, the defendant's counsel having admitted it during the cross-examination" of the plaintiff. She stated that she had feelings for Mahendra as a brother and not as a lover' When the mysterious parts of the letter beginning with the words "The matters on which" and ending with the words "such an affair" were put to her, she could not give any explanation as to what she meant. She denied the suggestion made on behalf of the plaintiff in these words:-

"It is not true that the reference here is to our having had sexual intercourse and being afraid that I might remain pregnant".

The sentence "I very much repented later on in my mind" was also put to her specifically and her answer was "I do not know what I repented for. I wrote some thing foolishly". Pressed further about the meaning of the next sentence after that, her answer was "I cannot now understand how I came to write such a letter. I admit that this reads like a letter written by a girl to her lover. Besides the fact that my brain was not working properly I bad no explanation to give as to how I wrote such a letter". She also admitted that she took good care to see that the. other members of the family, meaning the mother-in-law and the sisters-in-law, did not see her writing that letter and that she wanted that the letter should remain a secret to them. Being further pressed to explain the sentence "We need not be anxious now", her answer was " I did not intend to convey that I had got my monthly period about

which we were anxious. I cannot say what the normal natural meaning of this letter would be". She bad admitted having received at least one letter from Mahendra. Though it would appear from the trend of her cross-examination that she received more letters than one, she stated that she did not preserve any of his letters. She has further admitted in cross-examination "I have not signed this letter. It must have remained to be signed by mistake. I admit that under the letter where the signature should be I have put the word 'Namaste' only. It is not true that I did not sign this letter because I was afraid, that if it got into the hands of any one, it might compromise me and Mahendra. Mahendra would have known from my handwriting that this was my letter. I had previously written one letter to him. That letter also I had not signed. I had only said 'Namaste'". The tenor of the letter and the defendant's explanation or want of explanation in the witness box of those portions of the letter which very much need explanation would leave no manner of doubt in any person who read that letter that there was something between her and Mahendra which she was interested to keep a secret from everybody. Even when given the opportunity to explain, if she could, those portions of the letter, she was not able to put any innocent meaning to her words except saying in a bland way that it was a letter from a sister to a brother. The trial court rightly discredited her testimony relating to her answers with respect to the contents of the letter. The letter shows a correspondence between her and Mahendra which was clearly unworthy of a faithful wife and her pose of innocence by characterising it as between a sister and a brother is manifestly disingenuous. Her explanation, if any, is wholly unacceptable. The plaintiff naturally got suspicious of his wife and naturally taxed her with reference to the contents of the letter. That she had a guilty mind in respect of the letter is shown by the fact that she at first denied having written any such letter to Mahendra, a denial in which she persisted even in her answer to the plaint. The plaintiff's evidence that he showed her a photostatic copy of that letter on May 23, 1947, and that she then admitted having written that letter and that she bad tender feelings for Mahendra can easily be believed. The learned trial Judge was therefore justified in coming to the conclusion that the letter betrayed on the part of the writer "a consciousness of guilt". But it is questionable how far the learned Judge was justified in observing further that' the contents of the letter "are only capable of the interpretation that she had misbehaved with Mahendra during the absence of the plaintiff". If he meant by the word "misbehaved" that the defendant had sexual intercourse with Mahendra, he may be said to have jumped to the conclusion which did not necessarily follow as the only conclusion from them. The very fact that a married girl was writing amorous letters to a man other than her husband was reprehensible and easily capable of furnishing good grounds to the husband for suspecting the wife's fidelity. So far there can be no difficulty in assuming that the husband was fully justified in losing temper with his wife and in insisting upon her repentance and assurance of good conduct in future. But we are not prepared to say that the contents of the letter are capable of only that interpretation and no other. On the other hand, the learned Judges of the Appeal Court were inclined to view this letter as an evidence merely of what is sometimes characterised as "platonic love" between two persons who by reasons of bond of matrimony are compelled to restrain themselves and not to go further than merely showing love and devotion for each other. We are not prepared to take such a lenient, almost indulgent, view of the wife's conduct as betrayed in the letter in question. We cannot but sympathise with the husband in taking a very serious view of the lapse on the wife's part. The learned Judges of the Appeal Court have castigated the counsel for the plaintiff for putting those questions to the defendant in cross-examination. They observe in their judgment (speaking through the Chief Justice) that there was no justification for the counsel for the plaintiff to put to the defendant those questions in cross-examination suggesting that she had intercourse with Mahendra as a result of which they were apprehending future trouble in the shape of pregnancy and illegitimate child birth. It is true that it was

not in terms the plaintiff's case that there had been an adulterous intercourse between the defendant and Mahendra. That need not have been so, because the Act does not recognise adultery as one of the grounds for divorce. But we do not agree with the appellate Court that those questions to the defendant in cross-examination were not justified. The plaintiff proposed to prove that the discovery of the incriminating letter containing those mysterious sentences was the occasion for the defendant to make up her mind to desert,the plaintiff. We do not therefore agree with the observations of the appellate Court in all that they have said in respect of the letter in question.

There can be no doubt that the letter in question made the plaintiff strongly suspicious of his wife's conduct (to put it rather mildly), and naturally he taxed his wife to know from her as to what she bad to say about her relations with Mahendra. She is said to have confessed to him that Mahendra was a better man than the plaintiff and that he loved her and she loved him. When matters had come to such a head, the natural reaction of the parties would be that the husband would get not only depressed, as the plaintiff admitted in the witness box, but would in the first blush think of getting rid of such an unloving, if not a faithless, wife. The natural reaction of the defendant would be not to face the husband in that frame of mind. She would naturally wish to be out of the sight of her husband at least for some time, to gain time for trying, if she was so minded, to reestablish herself in her husband's estimation and affection, if not love. The event of the afternoon of May 24, 1947, must therefore be viewed in that light. There was going to be performed the marriage of the defendant's cousin at her father's place of business in Jalgaon, though it was about five to six weeks from then. The plaintiff would make it out in his evidence that she left rather in a recalcitrant mood in the afternoon during his absence in office with all her belongings and that she had refused his offer of being sent in his car to station and Rs. 100 for' expenses. This conduct on the part of the wife can easily be explained as that of a person who had found that her love letter had been discovered by the husband. She would-naturally try to flee away from the husband for the time being at least because she had not the moral courage to face him. The question is whether her leaving her marital home on the afternoon of May 24, 1947, is only consistent with her having deserted, her husband, in the sense that she had deliberately' decided permanently to forsake all relationship with her husband with the intention of not returning to consortium, without the consent of the husband and against his wishes. That is the plaintiff's case. May that conduct be not consistent with the defendant's case that she had not any such intention, i.e., being in desertion? The following observations of Pollock, M. R. in Thomas v. Thomas[2] may usefully be quoted in this connection:-

"Desertion is not a single act complete in itself and revocable by a single act of repentance.

The act of departure from the other spouse draws its significance from the purpose with which it is done, as revealed by conduct or other expressions of intention: see Charter v. Charter[3]. A mere temporary parting is equivocal, unless and until its purpose and object is made plain.

I agree with the observations of Day J. in Wilkinson v. Wilkinson[4] that desertion is not a specific act, but a course of conduct. As Corell Barnes J. said in Sickert v. Sickert[5]: 'The party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion'. That conduct is not necessarily wiped out by a letter of invitation to the wife to return".

2 [1924] P. 194.

3 84 L T. 272.

4 58 J. P. 415.

5 [1899] P. 278, 282

The defendant's further case that she bad been turned out of the house by the husband under duress cannot be accepted because it is not corroborated either by circumstances or by direct testimony. Neither her father nor her cousin say a word about her speaking to them on her arrival at Jalgaon that she had been turned out of her husband's home. If her case that she bad been forcibly turned out of her marital home by the husband had been made out, certainly the husband would have been guilty of "constructive desertion", because the test is riot who left the matrimonial home first. (See Lang v. Lang[6]). If one spouse by his words and conduct compel the other spouse to leave the marital home. the former would be guilty of desertion, though it is the latter who has physically separated from the other and has been made to leave the marital home. It should be noted that the wife did not cross-petition for divorce or for any other relief. Hence it is no more necessary for us to go into that question. It is enough to point out that we are not prepared to rely upon the uncorroborated testimony 'of the defendant Chat she had been compelled to leave her marital home by the threats of the plaintiff.

The happenings of May 24, 1947, as pointed out above, are consistent with the plaintiff's case of desertion by the wife. But they are also consistent not with the defendant's case as actually Pleaded in her written statement, but with the fact; and circumstances disclosed in the evidence, namely, that the defendant having been discovered in her clandestine amorous correspondence with her supposed paramour Mahendra, she could not face her husband or her husband's people living in the same flat in Bombay and therefore shamefacedly withdrew herself and went to her parent's place of business in Jalgaon on the pretext of the marriage of her cousin which was yet far off. That she was not expected at Jalgaon on that day in connection with the marriage is proved by her own admission in the witness box that "when I went to Jalgaon everyone was surprised". As pointed out above, the burden is on the plaintiff to prove desertion without cause for the statutory period of four years, that is. to say, that the deserting spouse must be in desertion throughout the whole period. In this connection the following observations of Lord Macmillan in his speech in the House of Lords in the case of Pratt v. Pratt[7] are apposite:-

"In my opinion what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without cause been in desertion. The 861, deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion". It is true that the defendant did not plead that she had left her husband's home in Bombay in the circumstances indicated above. She, on the other hand, pleaded constructive desertion by the husband. That case, as already observed, she has failed to substantiate by reliable evidence. But the fact that the defendant has so failed does not necessarily lead to the conclusion that the plaintiff has succeeded in proving his case. The plaintiff must satisfy the court that the defendant had been in desertion for the continuous period of four years as required by the Act. If we come to the conclusion that the happenings of May 24, 1947, are consistent with both the conflicting theories, it is plain that the plaintiff has not succeeded in bringing the offence of desertion home to the defendant beyond all reasonable doubt. We must therefore examine what other evidence there is in support of the plaintiff's case and in corroboration of his evidence in court.

6 [1955] A.C. 402. 417.

7 [1939] A C. 417, 420.

The next event of importance in this narrative is the plaintiff's solicitor's letter of July 15, 1947, addressed to the defendant, care of her father at Jalgaon. The defendant's cousin's marriage was performed towards the end of June and she could have come back to her husband's place, soon thereafter' Her evidence is that after the marriage had been performed she was making preparations to go back to Bombay but her father detained her and asked her to await a letter from the plaintiff. The defendant instead of getting an invitation from the plaintiff to come back to the marital home received the solicitor's letter aforesaid, which, to say the least, was not calculated to bring the parties nearer. The letter is in these terms:-

"Madam, Under instructions from our client Bipin Chandra J. Shah we have to address you as under:-

That you were married to our client in or about April 1942 at Patan. Since the marriage you and our client lived together mostly in Bombay and son by name Kirit was born on or about the 10th day of September 1944.

Our client. states that he left for Europe in January last and returned by the end of May last. After our client's return, our client learnt that during our client's absence from India you developed intimacy with one Mahendra and you failed to give any satisfactory reply when questioned about the same and left for your parents under the pretext of attending to the marriage ceremony of your cousin. You have also taken the minor with you and since then you are residing with your father to evade any satisfactory explanation.

Our client states that under the events that have happened, our client has become entitled to obtain a divorce and our client does not desire to keep you any longer under his care and protection. Our client desires the minor to be kept by him and we are instructed to request you to send back the minor to our client or if necessary our client will send his agent to bring the minor to him. Our client further states that in any event it will be in the interest of the minor that he should stay with our client. Our client has made this inquiry about the minor to avoid any unpleasantness when our client's agent comes to receive the minor". The letter is remarkable in some respects,apart from antedating the birth of the son Kirit by a year. The letter does not in terms allege that the defendant was in desertion, apart from mentioning the fact that she had left against the plaintiff's wishes or that she had done so with the intention of permanently abandoning her marital duties. On the other hand, it alleges that "You are residing with your father to avoid any satisfactory explanation". The most important part of the letter is to the effect that the plaintiff had "become entitled to obtain a divorce" and that he "does not desire to keep you any longer under his care and protection". Thus if the solicitor's letter is any indication of the working of the mind of the plaintiff, it makes it clear that at that time the plaintiff did not believe that the defendant had been in desertion and that the plaintiff had positively come to the determination that he was no longer prepared to affirm the marriage relationship. As already indicated, one of the essential conditions for success in a suit for divorce grounded upon desertion is that the deserted spouse should have been willing to fulfill his or her part of the marital duties. The statement of the law in para 457 at p. 244 of Halsbury's Laws of England (3rd Edn. Vol 12) may be usefully quoted:

"The burden is on the petitioner to show that desertion without cause subsisted, throughout the statutory period. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole of the three year period. It has been said that a petitioner should be able honestly to say that he or she was all along willing to fulfill the duties of the marriage, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent; but in practice it is accepted that once desertion has been started by the fault of the deserting spouse, it is

no longer necessary for the deserted spouse to show that during the three years preceding the petition be or she actually wanted the other spouse to come back, for the intention to desert is presumed to continue. That presumption may, however, be rebutted". Applying those observations to the facts of the present case, can the plaintiff honestly say that be was all along willing to fulfill the duties of the marriage and that the defendant's desertion, if any, continued throughout the statutory period without his consent. The letter, Ex. A) is an emphatic no. In the first place, even the plaintiff in that letter did not allege any desertion and, secondly, he was not prepared to receive her back to the matrimonial home. Realising his difficulty when cross-examined as to the contents of that letter, he wished the court to believe that at the time the letter was written in his presence he was "in a confused state of mind" and did not remember exactly whether he noticed the sentence -that he did not desire to keep his wife any longer. Pressed fur- ther in cross-examination, he was very emphatic in his answer and stated:-

"It is not true that by the date of this letter I had made up my mind not to take her back. It was my hope that the letter might induce her parents to find out what had happened, and they would persuade her to come back. I am still in the confused state of mind that despite my repeated attempts my wife puts me off".

In our opinion, the contents of the letter could not thus be explained away by the plaintiff in the witness box. On the other hand, it shows that about seven weeks after the wife's departure for her father's place the plaintiff had at least for the time being convinced himself that the defendant was no more a suitable person to live with. That, as found by us, be was justified in this attitude by the reprehensible conduct of his wife during his absence is beside the point. This letter has an importance of its own only in so far as it does not corroborate the plaintiff's version that the defendant was in desertion and that the plaintiff was all along anxious to induce her to come back to him. This letter is more consistent with the supposition that the husband was very angry with her on account of her conduct as betrayed by the letter, Ex. E and that the wife left her husband's place in shame not having the courage to face him after that discovery. But that will not render her in the eye of the law a deserter, as observed by Pollock, M. R. in Bowron v. Bowron[8] partly quoting from Lord Gorell as follows:-

"In most cases of desertion the guilty party

actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion: See also Graves v. Graves[9]; Pulford v. Pulford[10]; Jackson v. Jackson[11]; where Sir Henry Duke P. explains the same doctrine. You must look at the conduct of the spouses and ascertain their real intention".

It is true that once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued and that it is not necessary for the deserted spouse actually to take steps to bring the deserting spouse back to the matrimonial home. So far we do not find any convincing evidence in proof of the alleged desertion by the wife and naturally therefore the presumption of continued desertion cannot arise.

8 [1925] P. 187, 192.

9 3 Sw. & Tr. 350.

10 [1923] P. 18.

11 [1924] P. 19.

But it is not necessary that at the time the wife left her husband's home, she should have at the same time the animus deserendi. Let us therefore examine the question whether the defendant in this case, even if she had no such intention at the time she left Bombay, subsequently decided to put an end to the matrimonial tie. This is in consonance with the latest pronouncement of the Judicial Committee of the Privy Council in the case of Lang v. Lang[12] in an appeal from the decision of the High Court of Australia, to the following effect:-

"Both in England and in Australia, to establish desertion two things must be proved: first, certain outward and visible conduct the 'factum' of desertion; secondly, the 'animus deserendi' the intention underlying this conduct to bring the matrimonial union to an end.

In ordinary desertion the factum is simple: it is the act of the absconding party in leaving the matrimonial home. The contest in such a case will be almost entirely as to the 'animus'. Was the intention of the party leaving the home to break it up for good, or something short of, or different from that?" In this connection the episode of November, 1947, when the plaintiff's mother came from Patan to Bombay is relevant. It appears to be common ground now that the defendant had agreed to come back to Bombay along with the plaintiff's mother or after a few days. But on this information being given to the plaintiff he countermanded any such steps on the wife's part by sending the telegram, Ex. B,aforesaid and the plaintiff's father's letter dated November 15, 1947. 'We are keeping out of consideration for the present the letter, Ex. C, dated November 13, 1947, which is not admitted to have been received either by the defendant or her father. The telegram is in peremptory terms: "Must not send Prabha". The letter of November 15, 1947, by the plaintiff's father to the defendant's father is equally peremptory. It says "It is absolutely necessary that you should obtain the consent of Chi. Bipinchandra before sending Chi. Prabhavati". The telegram and the letter which is a supplement to the telegram, as found by the courts below, completely negative the plaintiff's statement in court that he was all along ready and willing to receive the defendant back to his home. The letter of November 13, 1947, Ex. C, which the plaintiff claims to have written to his father-in-law in explanation of the telegram and is a prelude to it is altogether out of tune with the tenor of the letter and the telegram referred to above. The receipt of this letter has been denied by the defendant and her father. In court this letter has been described as a fake in the sense that it was an afterthought and was written with a. view to the legal position and particularly with a view to getting rid of the effect of the solicitor's letter of July 15, which the plaintiff found it hard to explain away in the witness box. Neither the trial court, which was entirely in favour of the plaintiff and which had accepted the letter as genuine, nor the appellate Court, which was entirely in favour of the defendant has placed implicit faith in the bona fides of this letter. The lower appellate Court is rather ironical about it, observing "This letter as it were stands in isolated glory. There is no other letter. There is no other conduct of the plaintiff which is consistent with this letter". Without going into the controversy as to the genuineness or bona fldes of this letter, it can be said that the plaintiff's attitude, as disclosed therein, was that he was prepared to take her back into the matrimonial home provided she wrote a letter to him expressing real repentance and confession of mistake. This attitude of the plaintiff cannot be said to be unreasonable in the circumstances of the case. He was more sinned against than sinning at the beginning of the controversy between the husband and the wife.

This brings us to a consideration of the three attempts alleged by the plaintiff to have been made by him to induce his wife to return to the matrimonial home when he made two journeys to Patan in 1948 and the third journey in April- May, 1949, to Jalgaon. These three visits are not denied by the defendant. The only difference between the parties is as to the purpose of the visit and the substance

12 [1955] A.G. 402, 417.

of the talk between them. That the plaintiff's attachment for the defendant had not completely dried up is proved by the fact that when he came to know that she had been suffering from typhoid he went to Patan to see her. On this occasion which was the second visit the plaintiff does not say that he proposed to her to come back and that she refused to do so. He only says that she did not express any desire to come back. That may be explained as being due to diffidence on her part. But in respect of the first and the third visits the plaintiff states that on both those occasions he wanted her to come back but she refused. On the other hand, the defendant's version is that the purpose of his visit was only to take away the child and not to take her back to his home. It is also the plaintiff's complaint that the defendant never wrote any letter to him offering to come back. The wife's answer is that she did write a few letters before the solicitor's letter was received by the father and that thereafter under her father's advice she did not writeany more to the plaintiff. In this connection it becomes necessary to examine the evidence of her cousin Babulal and her father Popatlal. Her cousin, Babulal, who was a member of her father's joint family, deposes that on receipt of the letter, Ex. A, a fortnight later he and his father, since deceased, came to Bombay and saw the plaintiff. They expostulated with him and pleaded the defendant's cause and asked the plaintiff to forgive and forget and to take her back. The plaintiff's answer was that he did not wish to keep his wife. The defendant's father's evidence is to the effect that after receipt of the letter, Ex. A, he came to Bombay and saw the plaintiff's father at his residence and protested to him that "a false notice had been given to us". The plaintiff's father is said to have replied that they "would settle the matters amicably" He also deposes as to his brother and his brother's son having gone to the plaintiff. He further states that he with his wife and the defendant went to Patan and saw the plaintiff's mother and in consultation with her made arrangements to send her back to 'Bombay. But before that could be done the telegram, Ex. B, and the letter, Ex. D, were received and consequently he gave up the idea of sending the defendant to Bombay without straightening matters. Both these witnesses on behalf of the defendant further deposed to the defendant having done several times and stayed with the plaintiff's family, particularly his mother at Patan along with the boy. The evidence of these two witnesses on behalf of the defendant is ample corroboration of the defendant's ,case and the evidence in court that she has all along been ready and willing to go back to the matrimonial home. The learned trial Judge has not noticed this evidence and we have not the advantage of his comment on this corroborative evidence. This body of evidence is in consonance with the natural course of events. The plaintiff himself stated in the witness box that he had sent the solicitor's' letter by way of a shock treatment to the defendant's family so that they might persuade his wife to come back to his matrimonial home. The subsequent telegram and letters (assuming that both the letters of the 13th and 15th November had been posted in the usual course and received by the addressees) would give a shock to the family. Naturally thereafter the members of the family would be up and doing to see that a reconciliation is brought about between the husband and the wife. Hence the visits of the defendant's uncle and the father would be a natural conduct after they had been apprised of the rupture between them. We therefore do not see any sufficient reasons for brushing aside all that oral evidence which has been believed by the Lower Appellate Court and had not in terms been disbelieved by the trial court. This part of the case on behalf of the defendant and her evidence is corroborated by the evidence of the defendant's relatives aforesaid. It cannot be seriously argued that evidence should be disbelieved, because the witnesses happened to be the defendant's relatives. They were naturally the parties most interested in bringing about a reconciliation They were anxious not only for the welfare of the defendant but were also interested in the good name of the family and the community as is only natural in families like these which have not been so urbanised as to completely ignore the feelings of the community. They would therefore be the persons most

anxious in the interests of all the parties concerned to make efforts to bring the husband and the wife together and to put an end to a controversy which they con- sidered to be derogatory to the good name and, prestige of the families concerned. The plaintiff's evidence, on the other hand, on this part of the case is uncorroborated. Indeed his evidence stands uncorroborated in many parts of his case and the letters already discussed run counter to the tenor of his evidence in court. We therefore feel inclined to accept the defendant's case that after her leaving her husband's home and after the performance of her cousin's marriage she was ready and willing to go back to her husband. It, follows from what we have said so far that the wife was not in desertion though she left her husband's home without any fault on the part of the plaintiff which could justify her action in leaving him, and that after the lapse of a few months' stay at her father's place she was willing to go back to her matrimonial home. This conclusion is further supported by the fact that between 1948 and 1951 the defendant stayed with her mother- in-law at Patan whenever she was there, sometimes for months, at other times for weeks. This conduct is wholly inconsistent with the plaintiff's case that the defendant was in desertion during the four years that she was out of her matrimonial home. It is more consistent with the defen- dant's attempts to. get herself re-established in her husband's home after the rupture in May 1947 as aforesaid. It is also in evidence that at the suggestion of her mother- in-law the defendant sent her three year old son to Bombay so that be might induce his' ,father to send for the mother, The boy stayed in Bombay for about twenty days and then was brought. back to Patan by his father as he (the boy) was unwilling to stay there without the mother., This was in August_September 1948 when the defendant deposes to having questioned her husband why she bad not been called back and the husband's answer was evasive. Whether or not this statement of the defendant is true, there can be no doubt that the defendant would not have allowed her little boy of about three years of age to be sent alone to Bombay except in the hope that he might be instrumental in bringing about a reconciliation between the father and the mother. The defendant has deposed to the several efforts made by her mother-in-law and her father-in-law to intercede on her behalf with the plaintiff but without any result. There is no explanation why the plaintiff could not examine his father and mother in corroboration of his case of continuous desertion for the statutory period by the defendant. Their evidence would have been as valuable, if not more, as that of the defendant's father and cousin as discussed above. Thus it is not a case where evidence was not available in corroboration of the plaintiff's case. As the plaintiff's evidence on many important aspects of the case has remained uncorroborated by evidence which could be available to him, we must hold that the evidence given by the plaintiff falls short of proving his case of desertion by his wife. Though we do not find that the essential ingredients of desertion have been proved by the plaintiff, there cannot be the least doubt that it was the defendant who had by her objectionable conduct brought about a rupture in the matrimonial home and caused the plaintiff to become so cold to her after she left him.

In view of our finding that the plaintiff has failed to prove his case of desertion by the defendant, it is not necessary to go into the question of animus revertendi on which considerable argument with reference to case-law was addressed to us on both sides. For the aforesaid reasons we agree with the Appellate Bench of the High Court in the conclusion at which they had arrived, though not exactly for the same reasons. The appeal is accordingly dismissed. But as the trouble started on account of the defendant's con- duct, though she is successful in this Court, we direct that each party must bear its own costs throughout. Appeal dismissed.

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U.SREE VS U.SRINIVAS

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 8927-8928 OF 2012

Decided on 11 December, 2012

(Before Hon'ble Mr. Justice K.S. Radhakrishnan & Hon'ble Mr. Justice Dipak Misra, JJ.)

[Arising out of S.L.P. (Civil) Nos. 37449-37450 of 2012 (CC.5877-5878 of 2012)]

U. Sree ... Appellant
Versus
U. Srinivas ... Respondent

The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

….the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances.

….In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The appellant-wife instituted F.C.O.P. No. 568 of 1997 under Section 9 of the Hindu Marriage Act, 1955 (for brevity the Act) in the Principal Family Court, Chennai for restitution of conjugal rights. The respondent-husband filed F.C.O.P. No. 805 of 1998 under Sections 13(1)(i-a), 26 and 27 of the Act read with Section 7 of the Family Courts Act, 1984 praying for dissolution of marriage, custody of the child and return of jewellery and other items. The learned Family Judge jointly tried both the cases and, on the basis of the evidence brought on record, dismissed the

application for restitution of conjugal rights preferred by the wife and allowed the petition of the husband for dissolution of marriage and held that the child would remain in the custody of the mother on the principle that welfare of the child is paramount, and further the husband was not entitled to return of jewels or any other item from the wife in the absence of any cogent evidence in that regard. The learned Family Judge, while passing the decree for dissolution of marriage, directed to pay permanent alimony of Rs. 5 lacs each to the wife and her minor son within a month.

3. Being dissatisfied by the common order, the appellant-wife preferred C.M.A. No. 1656 of 2010 and C.M.A. No. 1657 of 2010 in the High Court of Judicature at Madras and the Division Bench concurred with the conclusion as regards the decree of dissolution of marriage as a consequence of which both the appeals had to meet the fate of dismissal. However, the Bench, apart from concurring with the grant of permanent alimony, directed the respondent-husband to pay a sum of maintenance amounting to Rs.12,500/- to the appellant-wife and her son from the date of order passed by the Chief Metropolitan Magistrate at Hyderabad till the date of the order passed by the High Court. Hence, the present two appeals have been preferred by special leave assailing the common judgment passed by the High Court in both the appeals.

4. The facts requisite to be stated for adjudication of the appeals are that the marriage between the appellant and the respondent was solemnized on 19.11.1994 at Tirupathi according to Hindu rites and customs. After entering into wedlock, they lived together at Vadapalani, Chennai. As tradition would warrant, she went to her parental home for delivery where a male child was born on 30th of May, 1995. The respondent celebrated the childs birth in his in-laws house and thereafter, the wife stayed with her parents for sometime. She returned to Chennai on 4.10.1995 and there she lived with her husband till 3.1.1996. The case of the wife in her application for restitution of marriage is that on 3.1.1996, her father-in-law, without her consent, took her to her parental home and, thereafter, the husband without any justifiable reason withdrew from her society. All efforts made by her as well as by her parents to discuss with her husband and his family members to find out a solution went in vain. In this backdrop, a prayer was made for restitution of conjugal rights.

5. The husband resisted the aforesaid stand contending, inter alia, that there was total incompatibility in the marital relationship inasmuch as she found fault with his life style, his daily routine, his likes and dislikes and picked up quarrels on trivial issues. She threw tantrums only with the exclusive purpose that she should dominate the relationship and have her own way. At the time of practising and learning music in the presence of his father, who was also his Guru, she hurled abuses and screamed which invariably followed with arguments and quarrels. Though she was expected, as per the customs, to show respect towards elders and to the senior artists, yet, throwing all traditional values to the wind, she would walk away by creating a scene to his utter embarrassment. His public image was totally ruined and reputation was mutilated. It was also alleged that she called her parents and threatened to initiate proceedings under the Indian Penal Code, 1860 with the help of her father, who was an I.A.S. officer in the Vigilance Department in the Government of Andhra Pradesh. With the efflux of time, the discord aggravated and the wife became more aggressive and did not allow her husband to go near her or the child. On 3.1.1996, when the wife expressed her desire to go to her parental home, he could not dare to object and she went with costly gifts received by him in India and abroad in recognition of his performance in music. Regard being had to the physical safety of the wife and the child, he requested his

father to escort them to Hyderabad. While she was at Hyderabad, she spread rumours among the relatives and friends pertaining to his fidelity, character and habits. It was further asserted by the husband that she had filed the petition only to harass him and, in fact, the manner in which he had been treated clearly exhibited mental cruelty and, therefore, the said relief should not be granted. It was averred that in view of the treatment meted out to the husband, dissolution of marriage was the only solution and not restitution of conjugal rights.

6. The respondent, in his petition for divorce, pleaded that after abandoning formal education, he pursued his career in music treating it as a concept of bhakti or devotion. He had to continue his sadhana as a daily routine under the guidance of his father as it was necessary to understand the nuances and the subtleties of music which could only be gathered by experience and acquisition of knowledge at the feet of a guru and also to keep alive the Guru- Sishya Parampara. The aforesaid aspect of his life was not liked by his wife and she always interrupted hurling abuses at him. Despite his best efforts to make his wife understand the family tradition and show reverence to the seniors in the sphere of music, she remained obstinate in her attitude and chose to walk away causing him not only embarrassment in public but also humiliation which affected his reputation and self respect. That apart, whenever the husband visited her at the parental home, he was deprived of conjugal rights and physically prevented from playing with the child. In spite of his sacrifice and efforts to adjust with her mental attitude, she remained adamant and her behavioural pattern remained painfully consistent. Gradually, her behaviour became very cruel and, eventually, he was compelled to file a case for judicial separation to which, as a counterblast, she filed a case for restitution of conjugal rights. She had communicated with her friends that she would like to see her husband behind bars on the ground of dowry harassment. She had also threatened that if he took part in any musical concert at Hyderabad, his life shall be endangered. Put in such a situation, left with no other alternative, he was compelled to file a petition for dissolution of marriage.

7. As the factual narration would unfurl, the wife in the written statement asserted that she was aware of the importance of music, its traditional values and clearly understood the devotion and dedication as she herself was a `Veena player and because of her sacrifice, her husband had gained reputation and popularity which also enhanced his financial status, but, with the rise, he failed to perform his duties as a husband. She denied the interruption in the practice sessions and controverted the factum of maltreatment. It was averred that as the husband had gained reputation, his parents and other relatives thought of a second marriage so that he could get enormous dowry. She denied the scandalous allegations and stated that she was proud of her husbands accomplishments. She justified her filing of petition before the Chief Metropolitan Magistrate for grant of maintenance as he was absolutely careless and negligent to look after her and the child. It was further pleaded that the grounds mentioned in the petition were vexatious and frivolous and, therefore, there was no justification for grant of a decree of divorce.

8. The learned Family Judge framed seven issues and, considering the oral and documentary evidence brought on record, came to hold that the wife had treated the husband with cruelty; that she had not taken any steps for re-union and had deserted him for thirteen years without any valid reason and, hence, the husband was entitled for a decree of divorce and she was not entitled to have a decree for restitution of conjugal rights. The learned Family Judge directed that the custody of the child should remain with the mother and the husband had miserably failed

to make out a case for return of jewels and other items. He granted permanent alimony as stated earlier.

9. Being grieved by the aforesaid decision of the learned Family Judge, the wife preferred two appeals. On behalf of the appellant-wife, it was urged before the High court that the judgment and decree passed by the Family Court regarding grant of divorce was passed on assumptions and presumptions; that she had suffered immense humiliation and hardship at the hands of the family members of the husband but the Family Court did not appreciate the said facet in proper perspective; that the finding relating to desertion by the wife was contrary to the evidence on record and, in fact, it was the case that the husband had left the wife in the lurch at her parental home and did not think for a moment to bring her back; that the allegation with regard to the interruption in the music learning sessions and her dislike of her husband had been deliberately stated to make out a case of mental cruelty; that certain documents had been placed reliance upon by the learned Family Judge though they were not admissible in evidence and further the documents produced by the wife had not been properly appreciated and dealt with; and that the court below would have been well advised, in the obtaining factual matrix, to direct restitution of conjugal rights. It is worth noting that alternatively it was urged that the trial Court had committed an error in granting permanent alimony of Rs. 10 lacs in toto, regard being had to the income of the husband.

10. In appeal, the High Court, after noting the respective contentions advanced by the learned counsel for the parties, proceeded to appreciate the essential ingredients which are necessary to be established to sustain a petition under Section 9 of the Act. After referring to certain decisions in the field and the concept of mental cruelty as stated in Halsburys Laws of England, 4th Edn., Vol. 13, para 623 and American Jurisprudence and the dictum laid down in N.G. Dastane v. S. Dastane[1], Rajani v. Subramaniam[2], Parveen Mehta v. Inderjit Mehta[3], Gananath Pattnaik v. State of Orissa[4], Shobha Rani v. Madhukar Reddi[5], Manisha Tyagi v. Deepak Kumar[6], Sujata Uday Patil v. Uday Madhukar Patil[7], Chanderkala Trivedi v. Dr. S.P. Trivedi[8] and Pranay Majumdar v. Bina Majumdar[9], the High Court came to hold that the material brought on record showed that the wife had gone to the parental home on 3.1.1996 and made no efforts to get reunited with the husband and, as per the evidence on record, she had admitted in the testimony recorded in O.P. No. 568 of 1995 that the relations between her and her husband were cordial till she left the matrimonial home. The High Court found that her depositions were contradictory inasmuch as on one hand she had stated that she had been ill-treated and on the other that there was cordial relationship. As is noticeable, the High Court referred to the xerox copy of the letter Exhibit R-8 dated 18.10.1995 written in her handwriting to her parents and observed that when the said letter was summoned from her father she stated that there was no such letter and on that ground the admissibility was called in question. The High Court opined that when the efforts were made to get the primary evidence and it could not be obtained, the secondary evidence could be adduced and that would be admissible under Section 65 of the Evidence Act. Be it noted, the English translation of the said letter was marked as Exhibit R-9 which indicated that the wife had clearly stated that she had spoken ill of her mother-in-law and others and had expressed her desire to seek divorce as she could not stay any longer in the matrimonial home. It was observed by the Bench that the conduct of the wife clearly established desertion and her behaviourial pattern exhibited mental cruelty meted out to the husband. The High Court also took note of the fact that a stage had reached where it had become well nigh

impossible for the couple to live together. Regard being had to the totality of the circumstances, the High Court gave the stamp of approval to the common judgment and decree passed by the learned Family Court.

11. We have heard Mrs. K. Sarada Devi, learned counsel for the appellant, and Mr. K. Ramamoorthy, learned senior counsel for the respondent. It is contended by Mrs. Sarada Devi that the learned Family Judge as well as the High Court had failed to appreciate that neither mental cruelty nor desertion had been established as per the law. It is contended by her that Exh. R-8 and R-9 were not admissible in evidence inasmuch as they could not be treated as secondary evidence as envisaged under Section 65 of the Evidence Act. It is further urged that the whole decision for granting divorce and denying restitution of conjugal rights has been based regard being had to the total break down of marriage but the said ground is not a legally permissible one to grant divorce.

12. Mr. K. Ramamoorthy, learned senior counsel appearing for the respondent, per contra, would submit that the said observation is one of the facets, but the High Court has, after due deliberations, returned findings relating to cruelty and desertion and the same being founded on proper appreciation of the material on record, this Court should not interfere in exercise of appeal entertained by grant of leave under Section 136 of the Constitution of India.

13. At this juncture, we may note with profit that as a matter of fact, the High Court has observed that it has become well nigh impossible for the husband and the wife to live together and the emotional bond between the parties is dead for all purposes. We have noted this aspect for completeness, but we will not address the said facet and will restrict our delineation only towards the justifiability of the conclusions pertaining to mental cruelty and desertion.

14. Before we dwell upon the tenability of the conclusions of desertion and mental cruelty, we think it condign to deal with the submission whether the photostat copy of the letter alleged to have been written by the wife to her father could have been admitted as secondary evidence. As the evidence on record would show, the said letter was summoned from the father who had disputed its existence.

The learned Family Court Judge as well as the High Court has opined that when the person is in possession of the document but has not produced the same, it can be regarded as a proper foundation to lead secondary evidence. In this context, we may usefully refer to the decision in Ashok Dulichand v. Madahavlal Dube[10] wherein it has been held that according to clause (a) of Section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it. Thereafter, the Court addressed to the facts of the case and opined thus: -

In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before Respondent 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support

of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of Respondent 1. There was also no other material on the record to indicate that the original document was in the possession of Respondent 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document. Be it noted, in this backdrop, the High Court had recorded a conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the photostat copy and this Court did not perceive any error in the said analysis.

15. In J. Yashoda v. K. Shobha Rani[11], after analyzing the language employed in Sections 63 and 65 (a), a two-Judge Bench held as follows:-

Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non- production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section.

16. In M. Chandra v. M. Thangamuthu and Other[12], It has been held as follows:-

It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.

17. Recently, in H. Siddiqui (Dead) by Lrs. v. A. Ramalingam[13], while dealing with Section 65 of the Evidence Act, this Court opined though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence.

Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It has been further held that mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

18. In the case at hand, the learned Family Judge has really not discussed anything relating to foundational evidence. The High Court has only mentioned that when the letter was summoned

and there was a denial, the secondary evidence is admissible. In our considered opinion, such a view is neither legally sound nor in consonance with the pronouncements of this Court and, accordingly, we have no hesitation in dislodging the finding on that score.

19. The next facet which is to be dwelled upon is whether the appellant had treated her husband with mental cruelty. The legal sustainability of the said conclusion has to be tested keeping the photostat copy of the letter out of consideration. At the very outset, we may state that there is no cavil over the proposition as to what cruelty includes. Regard being had to the same, we shall refer to certain authorities.

20. In Samar Ghosh v. Jaya Ghosh[14], a three-Judge Bench, after dealing with the concept of mental cruelty, has observed thus:-

99. The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances.

21. In Ravi Kumar v. Julmidevi[15], this Court has expressed thus: -

In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite varietyit may be subtle or even brutal and may be by gestures and words.

22. Recently, this Court, in Vishwanath Agrawal, s/o Sitaram Agrawal v. Sarla Vishwanath Agrawal[16], while dealing with the conception of cruelty, has stated that it has inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperament and emotions that have been conditioned by the social status. The two-Judge Bench referred to the decisions in Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasikhan[17], Shobha Rani (supra), Sheldon v. Sheldon[18], V. Bhagat v. D. Bhagat[19], Parveen Mehta (supra), Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate[20], A. Jayachandra v. Aneel Kaur[21], Vinita Saxena v. Pankaj Pandit[22], Samar Ghosh (supra) and Suman Kapur v. Sudhir Kapur[23],

and opined that when the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable, it would amount to mental cruelty. Emphasis was laid on the behavioral pattern of the wife whereby a dent is created in the reputation of the husband, regard being had to the fact that reputation is the salt of life.

23. In the case at hand, the husband has clearly deposed about the constant and consistent ill-treatment meted out to him by the wife inasmuch as she had shown her immense dislike to his sadhna in music and had exhibited total indifference and, in a way, contempt to the tradition of teacher and disciple. It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him re-married for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family. The learned Family Judge as well as the High Court has clearly analysed the evidence and recorded a finding that the wife had treated the husband with mental cruelty. True it is, there is some reference in that regard to the photostat copy of the letter which we have not accepted as admissible in evidence but the other evidence brought on record clearly support the findings recorded by the learned Family Judge and the High Court and the said finding remains in the realm of fact.

24. This Court, in State of U. P. v. Babul Nath[24], while considering the scope of Article 136 as to when this Court is entitled to upset a finding of fact, has observed thus: -

5. At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record.

25. In Bharat Coking Coal Ltd. v. Karam Chand Thapar & Bros. Pvt. Ltd.[25], this Court opined that the jurisprudence under Article 136 stands out to be extremely wide but that does not, however, warrant intervention in a situation having concurrent set of facts and an appeal therefrom on the factual issue. The article has been engrafted by the founding fathers of the Constitution for the purposes of avoiding mischief and injustice on the wrong assumption of law. The justice delivery system of the country prompts this Court to interfere under Article 136 of the Constitution when the need of the society stands established and the judgment, if left outstanding, would not only create prejudice but would also have an otherwise adverse effect on the society. Further elaborating, the Bench ruled thus:-

The jurisdiction under Article 136 stands out to be extremely wide but that does not, however, warrant intervention having concurrent set of facts and an appeal therefrom on the factual issue. The article has been engrafted by the founding fathers of the Constitution for the purposes of avoiding mischief of injustice on the wrong assumption of law. The justice delivery system of the country prompts this Court to interfere under Article 136 of the Constitution when the need of the society stands established and the judgment, if left outstanding, would not only create

prejudice but would have an otherwise adverse effect on to the society it is this solemn objective of administration of justice with which the Constitution-makers thought it prudent to confer such a power on to the Apex Court of the country. It is the final arbiter but only when the dispute needs to be settled by the Apex Court so as to avoid injustice and infraction of law.

26. In Ganga Kumar Srivastava v. State of Bihar[26], after referring to the earlier authorities, this Court culled out certain principles which would invite exercise of power of this Court under Article 136 of the Constitution:-

(i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact save in exceptional circumstances.

(ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted perversely or otherwise improperly.

(iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(iv) hen the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record.

27. In Dubaria v. Har Prasad and Another[27], it has been held that when there is infirmity in the decision because of excluding, ignoring and overlooking the abundant materials and the evidence, if considered in proper perspective, would have led to conclusion contrary to the one taken by both the High Court as well as the fora below, it would be open to this Court to interfere with the concurrent findings of fact.

28. Tested on the touchstone of the aforesaid principles, we have no trace of doubt that the finding returned by the Family Judge which has been given the stamp of approval by the High Court relating to mental cruelty cannot be said to be in ignorance of material evidence or exclusion of pertaining materials or based on perverse reasoning. In our view, the conclusion on that score clearly rests on proper appreciation of facts and, hence, we concur with the same.

29. Presently, we shall advert to the finding recorded by the learned Family Judge and the High Court relating to desertion by the wife. As the factual matrix would reveal, both the Courts have proceeded on the base that the wife had not endeavored to reunite herself with the husband and there had long lapse of time since they had lived together as husband and wife. On the aforesaid foundation, the conclusion has been drawn that there is an animus descerendi on the part of the wife. To test the tenability of the said conclusion, we have perused the petition for divorce from which it is evident that there is no pleading with regard to desertion. It needs no special emphasis to state that a specific case for desertion has to be pleaded. It is also interesting to note that the petition was not filed seeking divorce on the ground of desertion but singularly on cruelty. In the absence of a prayer in that regard, we are constrained to hold that the conclusion

arrived at as regards desertion by the learned Family Judge which has been concurred with by the High Court is absolutely erroneous and, accordingly, we overturn the same.

30. From the foregoing analysis, it is established that the husband has proved his case of mental cruelty which was the foundation for seeking divorce. Therefore, despite dislodging the finding of desertion, we conclude and hold that the respondent husband has rightly been granted a decree of divorce.

31. The next issue that emerges for consideration pertains to the grant of permanent alimony. It is noticeable that the wife had filed a case for grant of maintenance and residence under the Hindu Adoptions and Maintenance Act, 1956 at Hyderabad. The High Court has granted Rs. 12,500/- per month from the date of filing of the petition for maintenance and Rs.5 Lacs each to the wife and son towards permanent alimony. Whether the High Court should have granted Rs.12500/- as maintenance need not be addressed by us inasmuch as we are inclined to deal with this issue of grant of permanent alimony in a different backdrop. As is evincible from the orders of this Court when the matters were listed on 9.4.2012, the Court had taken note of the fact that the wife and son have been living separately at Hyderabad for about 16 years and, in that context, the following order was passed :-

Looking to the financial and social status of the parties, we request the learned senior counsel appearing for the respondent to ask his client to arrange for one flat for the petitioner and their so that they can live in the said flat comfortably. On this suggestion, being given by the Court, learned senior counsel appearing for the respondent prayed for time to seek instructions.

32. On 30.4.2012, the following order came to be passed:-

As per the Order passed by this Court on 09.04.2012, learned senior counsel appearing for the respondent-husband informed that respondent is ready and willing to buy a flat for the petitioner in Hyderabad, so that she will have a roof over her head for all the times to come.

However, the details of the same are required to be worked out.

It is, therefore, desirable that both the parties should remain present in this Court on 10.07.2012.

Without prejudice, a sum of Rs. 10 lakhs by way of Demand Draft is being paid by the respondent-husband to petitioner- wife. Other Rs. 10 lakhs is in deposit with the Family Court at Chennai. Petitioner will be at liberty to withdraw this amount.

33. We have reproduced the aforesaid orders to highlight that the husband had agreed to buy a flat at Hyderabad. However, when the matter was listed thereafter, there was disagreement with regard to the locality of the flat arranged by the husband and, therefore, the matter was heard on merits.

We have already opined that the husband has made out a case for divorce by proving mental cruelty.

As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In Vinny Parmvir Parmar v. Parmvir Parmar[28], while dealing with the concept of permanent alimony, this Court has observed that while granting permanent alimony, the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable

comfort considering her status and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party.

34. Keeping in mind the aforesaid broad principles, we may proceed to address the issue. The respondent himself has asserted that he has earned name and fame in the world of music and has been performing concerts in various parts of India and abroad. He had agreed to buy a flat in Hyderabad though it did not materialise because of the demand of the wife to have a flat in a different locality where the price of the flat is extremely high. Be that as it may, it is the duty of the Court to see that the wife lives with dignity and comfort and not in penury. The living need not be luxurious but simultaneously she should not be left to live in discomfort. The Court has to act with pragmatic sensibility to such an issue so that the wife does not meet any kind of man-made misfortune. Regard being had to the status of the husband, the social strata to which the parties belong and further taking note of the orders of this Court on earlier occasions, we think it appropriate to fix the permanent alimony at Rs 50 lacs which shall be deposited before the learned Family Judge within a period of four months out of which Rs.20 lacs shall be kept in a fixed deposit in the name of the son in a nationalized bank which would be utilised for his benefit. The deposit shall be made in such a manner so that the respondent wife would be in a position to draw maximum quarterly interest. We may want to clarify that any amount deposited earlier shall stand excluded.

35. On the basis of the forgoing discussion, the decree for dissolution of marriage is affirmed only on the ground of mental cruelty which eventually leads to dismissal of the appeals. The parties shall bear their respective costs.

K. S. Radhakrishnan

Dipak Misra

New Delhi; December 11, 2012

[1] (1975) 2 SCC 326
[2] AIR 1990 Kerala 1
[3] (2002) 5 SCC 706
[4] (2002) 2 SCC 619
[5] (1988) 1 SCC 105
[6] (2010) 4 SCC 339
[7] (2006) 13 SCC 272
[8] (1993) 4 SCC 232
[9] (2007) 9 SCC 217
[10] (1975) 4 SCC 664
[11] (2007) 5 SCC 730
[12] (2010) 9 SCC 712
[13] (2011) 4 SCC 240
[14] (2007) 4 SCC 511
[15] (2010) 4 SCC 476
[16] (2012) 7 SCC 288
[17] (1981) 4 SCC 250
[18] (1966) 2 WLR 993
[19] (1994) 1 SCC 337
[20] (2003) 6 SCC 334
[21] (2005) 2 SCC 22
[22] (2009) 1 SCC 422
[23] (2009) 1 SCC 422
[24] (1994) 6 SCC 29
[25] (2003) 1 SCC 6
[26] (2005) 6 SCC 211
[27] (2009) 9 SCC 346
[28] (2011) 13 SCC 112

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VISHWANAT VS SAU. SARLA VISHWANATH AGRAWAL

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4905 OF 2012

Decided on 4 July, 2012

(Before Hon'ble Mr. Justice Deepak Verma & Hon'ble Mr. Justice Dipak Misra, JJ.)

(Arising out of S.L.P. (Civil) No. 16528 of 2007)

Vishwanath S/o Sitaram Agrawal .....Appellant
Versus
Sau. Sarla Vishwanath Agrawal Respondent

J U D G M E N T

Regard being had to the aforesaid, we have to evaluate the instances. In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent-wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious. It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable. The husband felt humiliated both in private and public life. Indubitably, it created a dent in his reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. Thus analysed, it would not be out of place to state that his brain and the bones must have felt the chill of humiliation. The dreams sweetly grafted with sanguine fondness with the passage of time reached the Everstine disaster, possibly, with a vow not to melt. The cathartic effect looked like a distant mirage. The cruel behaviour of the wife has frozen the emotions and snuffed out the bright candle of feeling of the husband because he has been treated as an unperson. Thus, analysed, it is abundantly clear that with this mental pain, agony and suffering, the husband cannot be asked to put up with the conduct of the wife and to continue to live with her. Therefore, he is entitled to a decree for divorce.

DIPAK MISRA, J.

Leave granted.

2. The marriage between the appellant and the respondent was solemnized on the 30th of April, 1979 as per the Hindu rites at Akola. In the wedlock, two sons, namely, Vishal and Rahul, were born on 23.9.1982 and 1.11.1984 respectively. As the appellant-husband felt that there was total

discord in their marital life and compatibility looked like a mirage, he filed a petition for divorce under Section 13(1) (ia) of The Hindu Marriage Act, 1955 (for brevity the Act).

3. It was the case of the appellant before the court of first instance that the respondent-wife did not know how to conduct herself as a wife and daughter-in-law and despite persuasion, her behavioural pattern remained unchanged. The birth of the children had no impact on her conduct and everything worsened with the efflux of time. The behaviour of the respondent with the relatives and guests who used to come to their house was far from being desirable and, in fact, it exhibited arrogance and lack of culture and, in a way, endangered the social reputation of the family. That apart, she did not have the slightest respect for her mother-in-law. Despite the old lady being a patient of diabetes and hyper tension, it could not invoke any sympathy from the respondent and hence, there was total absence of care or concern.

4. As pleaded, in the month of March, 1990, there was a dacoity in the house where the appellant was staying and, therefore, they shifted to the ginning factory and eventually, on 17.3.1991, shifted to their own three storeyed building situate in Gandhi Chowk. Even with the passage of time, instead of bringing maturity in the attitude of the respondent, it brought a sense of established selfishness and non-concern for the children. Whim and irrationality reigned in her day-to-day behaviour and frequent quarrels became a daily affair. As misfortune would have it, on 23.1.1994, the mother of the appellant died and the freer atmosphere at home gave immense independence to the respondent to make the life of the appellant more troublesome. The appellant and his father were compelled to do their personal work as the entire attention of the servants was diverted in a compulsive manner towards her. Her immature perception of life reached its zenith when on certain occasions she used to hide the keys of the motorcycle and close the gate so that the appellant could not go to the office of the factory to look after the business. Frequent phone calls were made to the factory solely for the purpose of abusing and causing mental agony to the appellant. As asserted, the appellant and his sons used to sleep on the second floor whereas the respondent used to sleep in the bedroom on the third floor and their relationship slowly but constantly got estranged. As the cruelty became intolerable, the appellant visited his in-laws and disclosed the same but it had no effect on her behaviour. Eventually, on 1.5.1995, the respondent was left at the house of her parents at Akola and the appellant stayed in his house with the two sons. As the factual matrix would unveil, on 24.7.1995, a notice issued by her advocate was published in the daily Lokmat stating, inter alia, that the appellant is a womaniser and addicted to liquor. On 11.10.1995, at 4.00 p.m., the respondent came to the house of the appellant at Gandhi Chowk and abused the father, the children and the appellant. She, in fact, created a violent atmosphere in the house as well as in the office by damaging the property and causing mental torture to the appellant and also to the family members which compelled the appellant to lodge a complaint at the Police Station, Chopda. It was alleged that she had brought gundas and certain women to cause that incident. The said untoward incident brought the A.S.P., Jalgaon, to the spot. The publication in the newspaper and the later incident both occurred during the pendency of the divorce petition and they were incorporated by way of amendment. On the aforesaid basis, it was contended that the respondent had treated the appellant with cruelty and hence, he was entitled to a decree for divorce.

5. The asseverations made in the petition were controverted by the respondent stating that she was always respectful and cordial to her in- laws, relatives and the guests as was expected from a cultured daughter-in- law. They led a happy married life for 16 years and at no point of time she

showed any arrogance or any behaviour which could remotely suggest any kind of cruelty. She attended to her mother-in-law all the time with a sense of committed service and at no point of time there was any dissatisfaction on her part. She disputed the allegation that she had hidden the keys of the motorcycle or closed the gate or repeatedly called the appellant on phone at the office to abuse him or to disturb him in his work. It is her stand that the appellant owns an oil mill, ginning factory and a petrol pump at Chopda and had sold certain non-agricultural land by demarcating it into small plots. The appellant, as alleged, joined the computer classes which were run by one Neeta Gujarathi in the name and style of Om Computer Services and gradually the appellant started spending much of his time at the computer centre instead of attending to his own business in the factory. When the respondent became aware of the intimacy, she took serious objection to the same and therefrom their relationship became bitter.

6. It was alleged by the respondent that she was disturbed after knowing about the involvement of the appellant with another lady despite having an established family life and two adolescent sons and, therefore, she was compelled to make phone calls to make enquiries about his whereabouts. As the interference by the respondent was not appreciated by the appellant, he took the respondent on 1.5.1995 to Akola and left her at her parental house and never cared to bring her back to her matrimonial home. Her willingness to come back and stay with the husband and children could not get fructified because of the totally indifferent attitude shown by the appellant. Her attempts to see the children in the school became an exercise in futility, as the husband, who is a trustee of the school, managed to ensure that the boys did not meet her. It was further alleged that the said Neeta lived with him as his mistress and when the respondent came to know about it, she went to Chopda to ascertain the same and coming to know that Neeta was in the house of the appellant, she made an effort to enter into the house but she was assaulted. This resulted in gathering of people of the locality and the appellant-husband, as a counter-blast, lodged a complaint at the police station. The Deputy Superintendent of Police arrived at the scene and found that Neeta was inside the house and thereafter she was taken back to her house by the police. Because of the involvement of the appellant with the said Neeta, he had concocted the story of cruelty and filed the petition for divorce.

7. The learned trial Judge framed as many as four issues. The two vital issues were whether the appellant had been able to prove the alleged cruelty and whether he was entitled to take disadvantage of his own wrong. The appellant, in order to prove the allegation of cruelty, examined ten witnesses and on behalf of the respondent, eight witnesses were examined. The learned trial Judge, analysing the evidence on record, came to hold that there was conjugal relationship till 1.5.1995; that there was no substantial material on record to demonstrate that the respondent had behaved with immaturity immediately after marriage; that in the absence of cogent evidence, it was difficult to hold that the respondent had troubled the husband and his parents; that the evidence of PW-3, Ramesh, was not worthy of acceptance as he is close and an interested witness; that the allegation that whenever she used to go to her parental home, she was granting leave to the servants was not acceptable; that the appellant should have examined some of the servants including the maid servant but for some reason or other had withheld the best evidence; that the plea that the respondent was not looking after her mother-in-law who was suffering from paralysis from 1984 has not been proven; that the allegation that the respondent was hiding the uniforms of the children and not treating them well had not been proven because the version of Vishal could not be accepted as he was staying with the father and, therefore, it was

natural for him to speak in favour of the father; that the stand that the respondent was hiding the keys of the motorcycle and crumpling the ironed clothes of the appellant did not constitute mental cruelty as the said acts, being childish, were enjoyed by the appellant-husband; that the factum of abuse by the respondent on telephone had not been established by adducing reliable evidence; that the respondent and the appellant were sleeping on the third floor of the house and hence, she was sleeping with him in the bedroom and the allegation that he was deprived of sexual satisfaction from 1991 was unacceptable; that from the witnesses cited on behalf of the respondent, it was demonstrable that her behaviour towards her sons and in-laws was extremely good; that even if the allegations made by the appellant were accepted to have been established to some extent, it could only be considered as normal wear and tear of the marital life; that the plea of mental cruelty had not been proven as none of the allegations had been established by adducing acceptable, consistent and cogent evidence; that the notice published in the daily Lokmat on 28.7.1995 and the later incident dated 11.10.1995 being incidents subsequent to the filing of the petition for divorce, the same were not to be taken into consideration.

8. The learned trial Judge further returned the finding that the appellant was going to learn computer and taking instructions from Neeta Gujarathi and the plea that she was engaged as a Computer Operator in his office was not believable as no appointment letter was produced; that the stand that she was paid Rs.1200/- per month was not worthy of any credence as she was operating a computer centre; that from the evidence of the witnesses of the respondent, namely, RW-3 to RW-5, it was clear that Neeta Gujarathi was living with the appellant in his house and he had developed intimacy with her and, therefore, the subsequent events, even if analysed, were to be so done on the said backdrop; that the allegation that there was a gathering and they were violent and broke the windows was really not proven by adducing credible evidence; that the testimony of the witnesses of the respondent clearly reveal that Neeta was inside the house of the appellant and effort was made to bring her out from the house and no damage was caused to the property; that on that day, the police had come in the mid night hours and taken out Neeta from the house of the appellant and left her at her house; that the notice which was published in Lokmat was to protect the interest of the sons in the property and basically pertained to the appellants alienating the property; that the public notice was not unfounded or baseless and the question of defaming him and thereby causing any mental cruelty did not arise; that the allegations made in the application for grant of interim alimony that the appellant is a womaniser and is addicted to liquor cannot be considered for the purpose of arriving at the conclusion that the husband was meted with cruelty; that the allegations made in the written statement having been found to be truthful, the same could not be said to have caused any mental cruelty; that the cumulative effect of the evidence brought on record was that no mental cruelty was ever caused by the respondent; and that the husband could not take advantage of his own wrong. Being of this view, the learned trial Judge dismissed the application with costs and also dismissed the application of the respondent-wife for grant of permanent alimony.

9. Grieved by the aforesaid decision, the appellant-husband preferred Civil Appeal No. 23 of 1999. The first appellate court appreciated the evidence, dealt with the findings returned by the trial court and eventually came to hold that the cumulative effect of the evidence and the material brought on record would go a long way to show that the appellant had failed to make out a case of mental cruelty to entitle him to obtain a decree for divorce. The aforesaid conclusion by the appellate court entailed dismissal of the appeal.

10. Being dissatisfied with the judgment and decree passed by the learned appellate Judge, the husband preferred Second Appeal No. 683 of 2006 before the High Court. The learned single Judge of the High Court came to hold that there were concurrent findings of fact and no substantial question of law was involved. However, the learned single Judge observed that the sons of the parties had grown up and have been married; that the parties had no intention to patch up the matrimonial discord; and that the marriage had been irretrievably broken but that could not be considered by the High Court but only by the Apex Court under Article 142 of the Constitution. Expressing the aforesaid view, he did not admit the appeal and dismissed the same.

11. We have heard Mr. Arvind V. Sawant, learned senior counsel for the appellant-husband, and Mr. Vivek C. Solshe, learned counsel for the respondent-wife.

12. At the very outset, we would like to make it clear that though the learned single Judge of the High Court has expressed the view that the parties are at logger heads and have shown no inclination to patch the matrimonial rupture and the sons have grown up and got married and with the efflux of time, the relationship has been further shattered and hence, the marriage is irretrievably broken and only this Court can grant divorce in exercise of power under Article 142 of the Constitution, yet we are not going to take recourse to the same and only address ourselves whether a case for divorce has really been made out.

13. At this juncture, we may note with profit that the learned senior counsel for the appellant exclusively rested his case on the foundation of mental cruelty. It is his submission that if the evidence of the husband and other witnesses are scrutinized in an apposite manner along with the stand and stance taken in the written statement, it will clearly reveal a case of mental cruelty regard being had to the social status of the appellant. It is urged by him that the trial court as well as the appellate court have not given any credence to the evidence of some of the witnesses on the ground that they are interested witnesses though they are the most natural witnesses who had witnessed the cruel behaviour meted to the appellant.

14. It is the submission of the learned senior counsel for the appellant that the court of first instance as well as the appellate court have failed to take into consideration certain material aspects of the evidence and the appreciation of evidence being absolutely perverse, the High Court would have been well advised to scan and scrutinize the same but it declined to admit the appeal on the ground that there are concurrent findings of fact. It is canvassed by him that this Court, in exercise of power under Article 136 of the Constitution, can dislodge such concurrent findings of facts which are perverse, baseless, unreasonable and contrary to the material on record.

15. The learned counsel for the respondent, resisting the aforesaid submissions, contended that the view expressed by the High Court cannot be found fault with as the courts below have, at great length, discussed the evidence and appreciated the same with utmost prudence and objectivity and there is nothing on record to show that any material part of the evidence has been ignored or something extraneous to the record has been taken into consideration. It is highlighted by him that the stand put forth by the wife in her written statement having been established, the same cannot be construed to have constituted mental cruelty. Lastly, it is put forth that the appellant has created a dent in the institution of marriage and made a maladroit effort to take advantage of his own wrong which should not be allowed.

16. First, we shall advert to what actually constitutes mental cruelty and whether in the case at hand, the plea of mental cruelty has been established and thereafter proceed to address whether the courts below have adopted an approach which is perverse, unreasonable and unsupported by the evidence on record and totally unacceptable to invite the discretion of this Court in exercise of power under Article 136 of the Constitution to dislodge the same.

17. The expression cruelty has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status. In Sirajmohamedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan and another[1], a two-Judge Bench approved the concept of legal cruelty as expounded in Sm. Pancho v. Ram Prasad[2] wherein it was stated thus: -

Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.

Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife. It is apt to note here that the said observations were made while dealing with the Hindu Married Womens Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty.

18. In Shobha Rani v. Madhukar Reddi[3], while dealing with cruelty under Section 13(1)(ia) of the Act, this Court observed that the said provision does not define cruelty and the same could not be defined. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. Thereafter, the Bench proceeded to state as follows: -

First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

19. After so stating, this Court observed about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that when a spouse makes a complaint about treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. Their Lordships referred to the observations

made in Sheldon v. Sheldon[4] wherein Lord Denning stated, the categories of cruelty are not closed. Thereafter, the Bench proceeded to state thus: -

Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Ried observed in Gollins v. Gollins[5] :

In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.

20. In V. Bhagat v. D. Bhagat (Mrs.)[6], a two-Judge Bench referred to the amendment that had taken place in Sections 10 and 13(1)(ia) after the Hindu Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him/her to live with the other one is no longer the requirement. Thereafter, this Court proceeded to deal with what constitutes mental cruelty as contemplated in Section 13(1)(ia) and observed that mental cruelty in the said provision can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. To put it differently, the mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was further observed, while arriving at such conclusion, that regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinized in the context in which they are made. Be it noted, in the said case, this Court quoted extensively from the allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty.

21. In Praveen Mehta v. Inderjit Mehta[7], it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence

on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other.

22. In Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate[8], it has been opined that a conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot be so lightly ignored or brushed aside.

23. In A. Jayachandra v. Aneel Kaur[9], it has been ruled that the question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status and environment in which they live. If from the conduct of the spouse, it is established and/or an inference can legitimately be drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse about his or her mental welfare, then the same would amount to cruelty. While dealing with the concept of mental cruelty, enquiry must begin as to the nature of cruel treatment and the impact of such treatment in the mind of the spouse. It has to be seen whether the conduct is such that no reasonable person would tolerate it.

24. In Vinita Saxena v. Pankaj Pandit[10], it has been ruled that as to what constitutes mental cruelty for the purposes of Section 13(1)(ia) will not depend upon the numerical count of such incident or only on the continuous course of such conduct but one has to really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude necessary for maintaining a conducive matrimonial home.

25. In Samar Ghosh v. Jaya Ghosh[11], this Court, after surveying the previous decisions and referring to the concept of cruelty, which includes mental cruelty, in English, American, Canadian and Australian cases, has observed that the human mind is extremely complex and human behaviour is equally complicated. Similarly, human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious belief, human values and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances.

26. In Suman Kapur v. Sudhir Kapur[12], after referring to various decisions in the field, this Court took note of the fact that the wife had neglected to carry out the matrimonial obligations and further, during the pendency of the mediation proceeding, had sent a notice to the husband through her advocate alleging that he had another wife in USA whose identity was concealed. The said allegation was based on the fact that in his income-tax return, the husband mentioned the Social Security Number of his wife which did not belong to the wife, but to an American lady. The husband offered an explanation that it was merely a typographical error and nothing else. The High Court had observed that taking undue advantage of the error in the Social Security Number, the wife had gone to the extent of making serious allegation that the husband had married an American woman whose Social Security Number was wrongly typed in the income-

tax return of the husband. This fact also weighed with this Court and was treated that the entire conduct of the wife did tantamount to mental cruelty.

27. Keeping in view the aforesaid enunciation of law pertaining to mental cruelty, it is to be scrutinized whether in the case at hand, there has been real mental cruelty or not, but, a significant one, the said scrutiny can only be done if the findings are perverse, unreasonable, against the material record or based on non-consideration of relevant materials. We may note here that the High Court has, in a singular line, declined to interfere with the judgment and decree of the courts below stating that they are based on concurrent findings of fact. The plea of perversity of approach though raised was not adverted to.

28. It is worth noting that this Court, in Kulwant Kaur v. Gurdial Singh Mann (dead) by L.Rs. and others[13], has held that while it is true that in a second appeal, a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue. An issue pertaining to perversity comes within the ambit of substantial question of law. Similar view has been stated in Govindaraju v. Mariamman[14].

29. In Major Singh v. Rattan Singh (Dead) by LRs and others[15], it has been observed that when the courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the courts below are sustainable in law while hearing an appeal under Section 100 of the Code of Civil Procedure.

30. In Vidhyadhar v. Manikrao and another[16], it has been ruled that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. We may note here that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction under Section 100 of the Code of Civil Procedure. This view of ours has been fortified by the decision of this Court in Abdul Raheem v. Karnataka Electricity Board & Ors. [17].

31. Having stated the law relating to mental cruelty and the dictum of this Court in respect of the jurisdiction of the High Court where concurrent findings of fact are assailed, as advised at present, we will scan the evidence whether the High Court has failed to exercise the jurisdiction conferred on it despite the plea of perversity being raised. Any finding which is not supported by evidence or inferences is drawn in a stretched and unacceptable manner can be said to be perverse. This Court in exercise of power under Article 136 of the Constitution can interfere with concurrent findings of fact, if the conclusions recorded by the High Court are manifestly perverse and unsupported by the evidence on record. It has been so held in Alamelu and another v. State, Represented by Inspector of Police[18] and Heinz India Pvt. Ltd. & Anr. v. State of U.P. & Ors.[19]

32. Presently, to the core issue, viz, whether the appellant-husband had made out a case for mental cruelty to entitle him to get a decree for divorce. At this juncture, we may unhesitantly state that the trial court as well as the first appellate court have disbelieved the evidence of most of the witnesses cited on behalf of the husband on the ground that they are interested witnesses. In a matrimonial dispute, it would be inappropriate to expect outsiders to come and depose.

The family members and sometimes the relatives, friends and neighbours are the most natural witnesses. The veracity of the testimony is to be tested on objective parameters and not to be thrown overboard on the ground that the witnesses are related to either of the spouse. Exception has been taken by the courts below that the servants of the house should have been examined and that amounts to suppression of the best possible evidence. That apart, the allegations made in the written statement, the dismissal of the case instituted by the wife under Section 494 of the Indian Penal Code, the non-judging of the material regard being had to the social status, the mental make-up, the milieu and the rejection of subsequent events on the count that they are subsequent to the filing of the petition for divorce and also giving flimsy reasons not to place reliance on the same, we are disposed to think, deserve to be tested on the anvil of perversity of approach. Quite apart from the above, a significant question that emerges is whether the reasons ascribed by the courts below that the allegations made in the written statement alleging extra marital affair of the appellant-husband with Neeta Gujarathi has been established and, therefore, it would not constitute mental cruelty are perverse and unacceptable or justified on the basis of the evidence brought on record. These are the aspects which need to be scrutinized and appositely delved into.

33. The appellant-husband, examining himself as PW-1, has categorically stated that the wife used to hide the pressed clothes while he was getting ready to go to the factory. Sometimes she used to crumple the ironed clothes and hide the keys of the motorcycle or close the main gate. In the cross-examination, it is clearly stated that the wife was crumpling the ironed clothes, hiding the keys of the motorcycle and locking the gate to trouble him and the said incidents were taking place for a long time. This being the evidence on record, we are at a loss to find that the courts below could record a finding that the appellant used to enjoy the childish and fanciful behaviour of the wife pertaining to the aforesaid aspect. This finding is definitely based on no evidence. Such a conclusion cannot be reached even by inference. If we allow ourselves to say so, even surmises and conjectures would not permit such a finding to be recorded. It is apt to note here that it does not require Solomons wisdom to understand the embarrassment and harassment that might have been felt by the husband. The level of disappointment on his part can be well visualised like a moon in a cloudless sky.

34. Now we shall advert to the allegation made in the written statement. The respondent-wife had made the allegation that the husband had an illicit relationship with Neeta Gujarathi. The learned trial Judge has opined that the said allegation having been proved cannot be treated to have caused mental cruelty. He has referred to various authorities of many High Courts. The heart of the matter is whether such an allegation has actually been proven by adducing acceptable evidence. It is worth noting that the respondent had filed a complaint, RCC No. 91/95, under Section 494 of the Indian Penal Code against the husband. He was discharged in the said case. The said order has gone unassailed. The learned trial Judge has expressed the view that Neeta Gujarathi was having a relationship with the husband on the basis that though the husband had admitted that she was working in his office yet he had not produced any appointment letter to show that she was appointed as a computer operator. The trial Judge has relied on the evidence of the wife. The wife in her evidence has stated in an extremely bald manner that whenever she had telephoned to the office in the factory, the husband was not there and further that the presence of Neeta Gujarathi was not liked by her in-laws and the elder son Vishal. On a careful reading of the judgment of the trial court, it is demonstrable that it has been persuaded to return such

a finding on the basis of the incident that took place on 11.10.1995. It is worth noting that the wife, who examined herself as RW-1, stated in her evidence that Vishal was deposing against her as the appellant had given him a scooter. The learned trial Judge has given immense credence to the version of the social worker who, on the date of the incident, had come to the house of the appellant where a large crowd had gathered and has deposed that she had seen Neeta going and coming out of the house. The evidence of the wife, when studiedly scrutinized, would show that there was more of suspicion than any kind of truth in it. As has been stated earlier, the respondent had made an allegation that her son was influenced by the appellant-husband. The learned trial Judge as well as the appellate court have accepted the same. It is germane to note that Vishal, the elder son, was approximately 16 years of age at the time of examination in court. There is remotely no suggestion to the said witness that when Neeta Gujarati used to go to the house, his grandfather expressed any kind of disapproval. Thus, the whole thing seems to have rested on the incident of 11.10.1995. On that day, as the material on record would show, at 4.00 p.m., the wife arrived at the house of the husband. She has admitted that she wanted to see her father- in-law who was not keeping well. After she went in, her father-in-law got up from the chair and went upstairs. She was not permitted to go upstairs. It is testified by her that her father-in-law came down and slapped her. She has deposed about the gathering of people and publication in the newspapers about the incident. Vishal, PW-5, has stated that the mother had pushed the grandfather from the chair. The truthfulness of the said aspect need not be dwelled upon. The fact remains that the testimony of the wife that the father-in-law did not like the visit of Neeta does not appear to be true. Had it been so, he would not have behaved in the manner as deposed by the wife. That apart, common sense does not give consent to the theory that both, the father of the husband and his son, Vishal, abandoned normal perception of life and acceded to the illicit intimacy with Neeta. It is interesting to note that she has deposed that it was published in the papers that the daughter-in-law was slapped by the father- in-law and Neeta Gujarathi was recovered from the house but eventually the police lodged a case against the husband, the father-in-law and other relatives under Section 498A of the Indian Penal Code. We really fail to fathom how from this incident and some cryptic evidence on record, it can be concluded that the respondent-wife had established that the husband had an extra marital relationship with Neeta Gujarathi. That apart, in the application for grant of interim maintenance, she had pleaded that the husband was a womaniser and drunkard. This pleading was wholly unwarranted and, in fact, amounts to a deliberate assault on the character. Thus, we have no scintilla of doubt that the uncalled for allegations are bound to create mental agony and anguish in the mind of the husband.

35. Another aspect needs to be taken note of. She had made allegation about the demand of dowry. RCC No. 133/95 was instituted under Section 498A of the Indian Penal Code against the husband, father-in-law and other relatives. They have been acquitted in that case. The said decision of acquittal has not been assailed before the higher forum. Hence, the allegation on this count was incorrect and untruthful and it can unhesitatingly be stated that such an act creates mental trauma in the mind of the husband as no one would like to face a criminal proceeding of this nature on baseless and untruthful allegations.

36. Presently to the subsequent events. The courts below have opined that the publication of notice in the daily Lokmat and the occurrence that took place on 11.10.1995 could not be considered as the said events occurred after filing of the petition for divorce. Thereafter, the courts below

have proceeded to deal with the effect of the said events on the assumption that they can be taken into consideration. As far as the first incident is concerned, a view has been expressed that the notice was published by the wife to safeguard the interests of the children, and the second one was a reaction on the part of the wife relating to the relationship of the husband with Neeta Gujrathi. We have already referred to the second incident and expressed the view that the said incident does not establish that there was an extra marital relationship between Neeta and the appellant. We have referred to the said incident as we are of the considered opinion that the subsequent events can be taken into consideration. In this context, we may profitably refer to the observations made by a three-Judge Bench in the case of A. Jayachandra (supra) :-

The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct.

37. We may also usefully refer to the observations made in Suman Kapur (supra) wherein the wife had made a maladroit effort to take advantage of a typographical error in the written statement and issued a notice to the husband alleging that he had another wife in USA. Thus, this Court has expressed the opinion that the subsequent events can be considered.

38. Keeping in view the aforesaid pronouncement of law, we shall first appreciate the impact of the notice published in the Lokmat. The relevant part of the said notice, as published in the newspaper, reads as follows: -

Shri Vishwanath Sitaram Agrawal is having vices of womanizing, drinking liquor and other bad habits. He is having monthly income of Rs.10 lacs, but due to several vices, he is short of fund. Therefore, he has started selling the property. He has sold some properties. My client has tried to make him understand which is of no use and on the contrary, he has beaten my client very badly and has driven her away and dropped her to Akola at her parents house.

In the property of Shri Vishwanath Sitaram Agrawal my client and her two sons are having shares in the capacity of members of joint family and Shri Vishwanath Sitaram Agrawal has no right to dispose of the property on any ground. Immense emphasis has been given on the fact that after publication of the notice, the husband had filed a caveat in the court. The factual matrix would reveal that the husband comes from a respectable family engaged in business. At the time of publication of the notice, the sons were quite grown up. The respondent-wife did not bother to think what impact it would have on the reputation of the husband and what mental discomfort it would cause. It is manifest from the material on record that the children were staying with the father. They were studying in the school and the father was taking care of everything. Such a publication in the newspaper having good circulation can cause trauma, agony and anguish in the mind of any reasonable man. The explanation given by the wife to the effect that she wanted to protect the interests of the children, as we perceive, is absolutely incredible and implausible. The filing of a caveat is wholly inconsequential. In fact, it can decidedly be said that it was mala fide and the motive was to demolish the reputation of the husband in the society by naming him as a womaniser, drunkard and a man of bad habits.

39. At this stage, we may fruitfully reminisce a poignant passage from N.G. Dastane v. S. Dastane[20] wherein Chandrachud, J. (as his Lordship then was) observed thus: -

The court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures.

40. Regard being had to the aforesaid, we have to evaluate the instances. In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent-wife had really humiliated him and caused mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious. It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable. The husband felt humiliated both in private and public life. Indubitably, it created a dent in his reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity. Thus analysed, it would not be out of place to state that his brain and the bones must have felt the chill of humiliation. The dreams sweetly grafted with sanguine fondness with the passage of time reached the Everstine disaster, possibly, with a vow not to melt. The cathartic effect looked like a distant mirage. The cruel behaviour of the wife has frozen the emotions and snuffed out the bright candle of feeling of the husband because he has been treated as an unperson. Thus, analysed, it is abundantly clear that with this mental pain, agony and suffering, the husband cannot be asked to put up with the conduct of the wife and to continue to live with her. Therefore, he is entitled to a decree for divorce.

41. Presently, we shall deal with the aspect pertaining to the grant of permanent alimony. The court of first instance has rejected the application filed by the respondent-wife as no decree for divorce was granted and there was no severance of marital status. We refrain from commenting on the said view as we have opined that the husband is entitled to a decree for divorce. Permanent alimony is to be granted taking into consideration the social status, the conduct of the parties, the way of living of the spouse and such other ancillary aspects. During the course of hearing of the matter, we have heard the learned counsel for the parties on this aspect. After taking instructions from the respective parties, they have addressed us. The learned senior counsel for the appellant has submitted that till 21.2.2012, an amount of Rs.17,60,000/- has been paid towards maintenance to the wife as directed by the courts below and hence, that should be deducted from the amount to be fixed. He has further submitted that the permanent alimony should be fixed at Rs.25 lacs. The learned counsel for the respondent, while insisting for affirmance of the decisions of the High Court as well as by the courts below, has submitted that the amount that has already been paid should not be taken into consideration as the same has been paid within a span of number of years and the deduction would affect the future sustenance. He has emphasised on the income of the husband, the progress in the business, the inflation in the cost of living and the way of life the respondent is expected to lead. He has also canvassed that the age factor and the medical

aid and assistance that are likely to be needed should be considered and the permanent alimony should be fixed at Rs.75 lacs.

42. In our considered opinion, the amount that has already been paid to the respondent-wife towards alimony is to be ignored as the same had been paid by virtue of the interim orders passed by the courts. It is not expected that the respondent-wife has sustained herself without spending the said money. Keeping in view the totality of the circumstances and the social strata from which the parties come from and regard being had to the business prospects of the appellant, permanent alimony of Rs.50 lacs (rupees fifty lacs only) should be fixed and, accordingly, we so do. The said amount of Rs.50 lacs (rupees fifty lacs only) shall be deposited by way of bank draft before the trial court within a period of four months and the same shall be handed over to the respondent-wife on proper identification.

43. Consequently, the appeal is allowed, the judgments and decrees of the courts below are set aside and a decree for divorce in favour of the appellant is granted. Further, the husband shall pay Rs.50 lacs (rupees fifty lacs only) towards permanent alimony to the wife in the manner as directed hereinabove. The parties shall bear their respective costs.

[Deepak Verma]

[Dipak Misra]

New Delhi; July 04, 2012

[1] (1981) 4 SCC 250

[2] AIR 1956 All 41

[3] (1988) 1 SCC 105

[4] (1966) 2 All ER 257

[5] (1963) 2 All ER 966

[6] (1994) 1 SCC 337

[7] AIR 2002 SC 2582

[8] AIR 2003 SC 2462

[9] (2005) 2 SCC 22

[10] (2006) 3 SCC 778

[11] (2007) 4 SCC 511

[12] AIR 2009 SC 589

[13] AIR 2001 SC 1273

[14] (2005) 2 SCC 500

[15] AIR 1997 SC 1906

[16] (1999) 3 SCC 573

[17] AIR 2008 SC 956

[18] AIR 2011 SC 715

[19] (2012) 3 SCALE 607 = (2012) 2 KLT (SN) 64

[20] (1975) 3 SCR 967

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LANDMARK JUDGMENTS ON

ALIMONY & MAINTENANCE

"An application for grant of maintenance has to be disposed of at the earliest. When an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. These litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs."

Justice Dipak Misra
2015 (5) SCC 705

SHAMIM BANO V. ASRAF KHAN

(2014) 12 Supreme Court Cases 636

(Before Hon'ble Mr. Justice Dipak Misra & Hon'ble Mr. Justice Vikramajit Sen, JJ.)

Shamim Bano … Appellant
Versus
Asraf Khan …Respondent

Criminal Appeal No. 820 of 2014[†],

decided on April 16, 2014

Criminal Procedure Code, 1973 — S. 125 — Maintainability of claim under — Muslim wife claiming maintenance under S. 125 CrPC — Subsequently divorce took place — Wife as a consequence of divorce taking recourse to S. 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 for grant of mahr and return of articles and obtaining relief — Application under S. 125 CrPC, held, not to be restricted to the date of divorce and, as arrancillary to it, further held, filing of application under S. 3 of the 1986 Act after divorce for grant of mahr and return of gifts would not disentitle the wife to sustain her application under S. 125 CrPC — Lastly, regard being had to present fact situation, consent under S. 5 of the 1986 Act was not imperative to maintain application under S. 125 CrPC — Thus, having regard to fact that High Court rejected the challenge to dismissal of application under S. 125 CrPC mainly guided by issue as to maintainability of that application, matter remitted to trial Magistrate for re-adjudication of controversy in question keeping in view the principles stated herein — Muslim Women (Protection of Rights on Divorce) Act, 1986, Ss. 3 and 5

The appellant and the respondent were married as per the Muslim Shariyat law. At the instance of the appellant, a criminal case under Section 498-A read with Section 34 IPC was lodged against the respondent husband and his family members. But all the accused in the said case were acquitted. During pendency of the said case, the appellant filed an application under Section 125 CrPC for grant of maintenance on the ground of desertion and cruelty. While the said application was pending, divorce between the appellant and the respondent took place. At that juncture, the appellant filed an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the 1986 Act"). The Magistrate hearing the application preferred under Section 125 CrPC, dismissed the same on the ground that the appellant had not been able to prove her case. But, while dealing with the application preferred under Section 3 of the 1986 Act, the Magistrate allowed that application directing the husband and others to pay a sum of Rs 11,786 towards mahr, return of goods and ornaments and a sum of Rs 1750 towards maintenance during the iddat period.

Being aggrieved with the order not granting maintenance, the appellant approached the Revisional Court, but did not succeed. Thereafter, the appellant approached the High Court by way of a petition under Section 482 CrPC. The High Court, after referring to certain authorities, held that a Muslim woman was entitled to claim maintenance under Section 125 CrPC even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the 1986 Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 CrPC in

the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either jointly or separately that they would prefer to be governed by the provisions of the CrPC; that the applicability of Sections 125 to 128 CrPC would depend upon exercise of statutory option available to parties under Section 5 of the 1986 Act and as the appellant wife had taken recourse to the provisions contained in the 1986 Act, it was to be concluded that she was to be governed by the provisions of the 1986 Act; that the claim of the appellant under Section 125 CrPC until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the 1986 Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the 1986 Act to be governed by Section 125 CrPC, was to be governed by the provisions contained in the

1986 Act; that as the application under Section 3 of the 1986 Act had already been allowed and that was affirmed by the High Court too, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 CrPC; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding up to the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction. Hence the present appeal.

The two seminal issues that arose for consideration were: (i) whether the appellant's application for grant of maintenance under Section 125 CrPC was to be restricted to the date of divorce and, as an ancillary to it, whether filing of an application under Section 3 of the 1986 Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain her application under Section 125 CrPC; and (ii), whether regard being had to the present fact situation, the consent under Section 5 of the 1986 Act was an imperative to maintain the application under Section 125 CrPC.

Allowing the appeal, the Supreme Court

Held :

The High Court held that as the appellant had already taken recourse to Section 3 of the 1986 Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 CrPC would only be maintainable till she was divorced. It is to be noted that the divorce took place during the pendency of the appellant's application under Section 125 CrPC. The appellant preferred an application under Section 3 of the 1986 Act for grant of mahr and return of articles. The Magistrate directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the iddat period by the Magistrate as the petition was different. That apart, the authoritative interpretation in Danial Latifi, (2001) 7 SCC 740, was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 CrPC was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the 1986 Act for grant of maintenance was filed, the parameters of Section 125 CrPC would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued. (Para 15)

Regard being had to the dictum in Khatoon Nisa, (2014) 12 SCC 646, seeking of option under Section 5 of the 1986 Act would not make any difference. The High Court is not correct in opining that when the appellant wife filed application under Section 3 of the 1986 Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 CrPC to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable. (Paras 13 and 17)

The High Court was principally guided by the issue of maintainability and affirmed the findings of the courts below. In this view, the matter is remitted to the trial Magistrate for re-adjudication of the controversy in question keeping in view the principles stated herein. Be it clarified, if, in the meantime, the appellant has remarried, the same has to be taken into consideration. It would be open to the appellant wife to file a fresh application for grant of interim maintenance, if so advised.

(Paras 18 and 19)

Danial Latifi v. Union of India, (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266; *Khatoon Nisa v. State of U.P.*, (2014) 12 SCC 646; *Shabana Bano v. Imran Khan*, (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, *applied*

Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *considered*

Shamim Bano v. AsrafKhan, Misc. Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh), reversed

W-M/53216/SRV

Advocates who appeared in this case:

Fakhruddin, Senior Advocate (Raj Kishor Choudhary, Ms Neeru Sharma and Surya Kamal Mishra (for T. Mahipal) Advocates, for the Appellant;

Kaustubh Anshuraj and Vikrant Singh Bais, Advocates, for the Respondent.

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2. Misc. Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh), Shamim Bano v. Asraf Khan (reversed) 640a
3. (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, Shabana Bano v. Imran Khan 644c, 644c-d
4. (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266", Danial Latifi v. Union of India 641d, 641e-f, 642a, 642d-e, 643a, 643e-f, 643g-h, 644c-d, 644g-h
5. (1985) 2 SCC 556 : 1985 SCC (Cri) 245, Mohd. Ahmed Khan v. Shah BanoBegum 641a-b, 641d-e, 642a-d

The Judgment of the Court was delivered by

Dipak Misra, J. — Leave granted. The appellant, Shamim Bano, and the respondent, Asraf Khan, were married on 17.11.1993 according to the Muslim Shariyat law. As the appellant was meted with cruelty and torture by the husband and his family members regarding demand of dowry, she was compelled to lodge a report at the Mahila Thana, Durg, on 6.9.1994, on the basis of which a criminal case under Section 498-A read with Section 34 IPC was initiated and, eventually, it was tried by the learned Magistrate at Rajnandgaon who acquitted the accused persons of the said charges.

2. Be it noted, during the pendency of the criminal case under Section 498-A/34 IPC before the trial court, the appellant filed an application under Section 125 of the Code of Criminal Procedure (for short "the Code") in the Court of Judicial Magistrate First Class, Durg for grant of maintenance on the ground of desertion and cruelty. While the application for grant of maintenance was pending, divorce between the appellant and the respondent took place on 5.5.1997. At that juncture, the appellant filed Criminal Case No. 56 of 1997 under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for brevity "the Act") before the learned Judicial Magistrate First Class, Durg. The learned Magistrate, who was hearing the application preferred under Section 125 of the Code, dismissed the same on 14.7.1999 on the ground that the appellant had not been able to prove cruelty and had been living separately and hence, she was not entitled to get the benefit of maintenance. The learned Magistrate, while dealing with the application preferred under Section 3 of the Act, allowed the application directing the husband and others to pay a sum of Rs.11,786/- towards mahr, return of goods and ornaments and a sum of Rs.1,750/- towards maintenance during the *Iddat* period.

3. Being grieved by the order not granting maintenance, the appellant filed Criminal Revision No. 275 of 1999 and the revisional court concurred with the view expressed by the learned Magistrate and upheld the order of dismissal. The aforesaid situation constrained the appellant to invoke the jurisdiction of the High Court under Section 482 of the code in Misc. Crl. Case No. 188 of 2005. Before the High Court a preliminary objection was raised on behalf of the respondent-husband that the petition under Section 125 of the Code was not maintainable by a divorced woman without complying with the provisions contained in Section 5 of the Act. It was further put forth that initial action under Section 125 of the Code by the appellant wife was tenable but the same deserved to be thrown overboard after she had filed an application under Section 3 of the Act for return of gifts and properties, for payment of mahr and also for grant of maintenance during the 'Iddat' period. It was also urged that the wife was only entitled to maintenance during the Iddat period and the same having been granted in the application, which was filed after the divorce, grant of any maintenance did not arise in exercise of power under Section 125 of the Code. Quite apart from the above, both the parties also had advanced certain contentions with regard to obtaining factual score.

4. The High Court, after referring to certain authorities, came to hold[1] that a Muslim woman is entitled to claim maintenance under Section 125 of the Code even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 of the Code in the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either jointly or separately that they would be preferred to be governed by the provisions of the Code; that the applicability of Sections 125 to 128 of the Code would depend upon exercise of statutory option available to parties under Section 5 of the Act and as the appellant-wife had taken recourse to the provisions contained in the Act, it was to be concluded that she was to be governed by the provisions of the Act; that the claim of the appellant under Section 125 of the Code until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the Act to be governed by Section 125 of the Code, was to be governed by the provisions contained

1 Shamim Bano v. Asraf Khan, Criminal Case No. 188 of 2005, order dated 1-3-2012 (Chh)

in the Act; that as the application under Section 3 of the Act having already been dealt with by the learned Magistrate and allowed and affirmed by the High Court under Section 482 of the Code, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 of the Code; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding upto the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction.

5. We have heard Mr. Fakhruddin, learned senior counsel appearing for the appellant, and Mr. Kaustubh Anshuraj, learned counsel appearing for the respondent.

6. The two seminal issues that emanate for consideration are, first, whether the appellant's application for grant of maintenance under Section 125 of the Code is to be restricted to the date of divorce and, as an ancillary to it, because of filing of an application under Section 3 of the Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain the application under Section 125 of the Code; and second, whether regard being had to the present fact situation, as observed by the High Court, the consent under Section 5 of the Act was an imperative to maintain the application.

7. To appreciate the central controversy, it is necessary to sit in a time machine for apt recapitulation. In ***Mohd. Ahmed Khan v. Shah Bano Begum***[2], entertaining an application under Section 125 of the Code, the learned Magistrate had granted monthly maintenance for a particular sum which was enhanced by the High Court in exercise of revisional jurisdiction. The core issue before the Constitution Bench was whether a Muslim divorced woman was entitled to grant of maintenance under Section 125 of the Code. Answering the said issue, after referring to number of texts and principles of Mohammedan Law, the larger Bench opined that taking the language of the statute, as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 of the Code and that mahr is not such a quantum which can ipso facto absolve the husband of the liability under the Code, and would not bring him under Section 127(3)(b) of the Code.

8. After the aforesaid decision was rendered, the Parliament enacted the Act. The constitutional validity of the said Act was assailed in ***Danial Latifi and another v. Union of India***[3] wherein the Constitution bench referred to the Statement of Objects and Reasons of the Act, took note of the true position of the ratio laid down in *Shah Bano*[2] case and after adverting to many a facet upheld the constitutional validity of the Act. While interpreting Sections 3 and 4 of the Act, the Court came to hold that the intention of the Parliament is that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. Thereafter, the Court proceeded to state thus: (*Danial Latifi* case[3], SCC pp. 760-61, para 28)

> *"28. ... In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be*

2 (1985) 2 SCC 556
3 (2001) 7 SCC 740

read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time."

9. In the said case the Constitution Bench[3] observed that in actuality the Act has codified the rationale contained in *Shah Bano's case*2. While interpreting Section 3 of the Act, it was observed that the said provision provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties and further indicates that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The Court further observed that the emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period", and if the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the Act.

10. Thereafter the larger Bench opined thus: (*Danial Latifi* case[3], SCC pp. 762, para 30-31)

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agree that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional."

11. Eventually the larger Bench in *Danial Latifi* case[3] concluded that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes

her maintenance as well and such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3 of the Act; that liability of a Muslim husband to his divorced wife arising under Section 3 of the Act to pay maintenance is not confined to the iddat period; and that a divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents and if any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

12. At this Juncture, it is profitable to refer to another Constitution Bench decision in ***Khatoon Nisa v. State of U.P. and Ors.***,[4] wherein question arose whether a Magistrate is entitled to invoke his jurisdiction under Section 125 of the Code to grant maintenance in favour of a divorced Muslim woman. Dealing with the said issue the Court ruled that subsequent to the enactment of the Act as it was considered that the jurisdiction of the Magistrate under Section 125 of the Code can be invoked only when the conditions precedent mentioned in Section 5 of the Act are complied with. The Court noticed that in the said case the Magistrate had returned a finding that there having been no divorce in the eye of law, he had the jurisdiction to grant maintenance under Section 125 of the Code. The said finding of the magistrate had been upheld by the High Court. The Constitution Bench, in that context, ruled thus: (SCC p. 649, para 10)

> *"10. ... The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India[3]. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr.P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr.P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr.P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case[3] under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr.P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman."*

13. The aforesaid principle clearly lays down that even an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

4 2002 (6) SCALE 165

14. Slightly recently, in ***Shabana Bano v. Imran Khan***[5], a two-Judge Bench, placing reliance on *Danial Latifi*[3], has ruled that: (Shabana Bano case[5], SCC p. 672, para 21)

> *"21. ... The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."*

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in *Khatoon Nisa*[4].

15. Coming to the case at hand, it is found that the High Court has held that as the appellant had already taken recourse to Section 3 of the Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 of the Code would only be maintainable till she was divorced. It may be noted here that during the pendency of her application under Section 125 of the Code the divorce took place. The wife preferred an application under Section 3 of the Act for grant of mahr and return of articles. The learned Magistrate, as is seen, directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the Iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the Iddat period by the learned Magistrate as the petition was different. We are disposed to think so as the said application, which has been brought on record, was not filed for grant of maintenance. That apart, the authoritative interpretation in *Danial Latifi*[3] was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 of the Code was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the Act for grant of maintenance was filed, the parameters of Section 125 of the Code would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued.

16. Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband. Needless to emphasise, the entitlement and the necessitous provisions have to be made in accordance with the parameters of law.

17. Under these circumstances, regard being had to the dictum in Khatoon Nisa's case, seeking of option would not make any difference. The High Court is not correct in opining that when the appellant-wife filed application under Section 3 of the Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 of the Code to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable.

18. It is noticed that the High Court has been principally guided by the issue of maintainability and affirmed the findings. Ordinarily, we would have thought of remanding the matter to the High Court for reconsideration from all spectrums but we think it appropriate that the matter should be heard and dealt with by the Magistrate so that parties can lead further evidence. Be it clarified,

5 (2010) 1 SCC 666

if, in the meantime, the appellant has remarried, the same has to be taken into consideration, as has been stated in the aforestated authorities for grant of maintenance. It would be open to the appellant-wife to file a fresh application for grant of interim maintenance, if so advised. Be it clarified, we have not expressed anything on the merits of the case.

19. In the result, the appeal is allowed and the impugned orders are set aside and the matter is remitted to the learned Magistrate for re-adjudication of the controversy in question keeping in view the principles stated hereinabove.

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SHABANA BANO VS IMRAN KHAN

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Crl.A. @ SLP(Crl.)NO.717/09
(Before Hon'ble Mr. Justice B. Sudershan Reddy & Hon'ble Mr. Justice Deepak Verma, JJ.)

(2010) 1 SCC 666

CRIMINAL APPEAL NO.2309 OF 2009
[Arising out of S.L.P.(Crl.) No.717 of 2009]

Shabana Bano ....Appellant
Versus
Imran Khan ....Respondent

The point stands settled by judgment of this Court reported in (2001) 7 SCC 740 titled Danial Latifi & Anr. Vs. Union of India pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced herein under:

i) A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

ii) Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case [(1985) 2 SCC 556 Mohd. Ahmed Khan vs. Shah Bano Begum & Ors.]. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material - all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another

conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

JUDGMENT

Deepak Verma, J.

1. Leave granted.

2. Appellant Shabana Bano was married to the respondent Imran Khan according to Muslim rites at Gwalior on 26.11.2001. According to the appellant, at the time of marriage, necessary household goods to be used by the couple were given. However, despite this, the respondent-husband and his family members treated the appellant with cruelty and continued to demand more dowry.

3. After some time, the appellant became pregnant and was taken to her parents' house by the respondent. The respondent threatened the appellant that in case his demand of dowry is not met by the appellant's parents, then she would not be taken back to her matrimonial home even after delivery.

4. Appellant delivered a child in her parental home. Since even after delivery, respondent did not think it proper to discharge his responsibility by taking her back, she was constrained to file a petition under Section 125 of the Code of Criminal Procedure (for short, 'Cr.P.C.') against the respondent in the Court of Family Judge, Gwalior. It was averred by the appellant that respondent has been earning a sum of Rs. 12,000/- per month by doing some private work and she had no money to maintain herself and her new-born child. Thus, she claimed a sum of Rs.3000/- per month from the respondent towards maintenance.

5. On notice being issued to the respondent, he denied all the contents of the petition filed by the appellant under Section 125 of the Cr.P.C. except admitting his marriage with the appellant.

6. Preliminary objections were raised by the respondent that appellant has already been divorced on 20.8.2004 in accordance with Muslim Law. Thus, under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as `Muslim Act'), appellant is not entitled to any maintenance after the divorce and after the expiry of the iddat period. It was also contended by him that appellant herself is earning Rs.6,000/- per month by giving private tuitions and is not dependent on the income of the respondent, thus, she is not entitled to any maintenance. It was also contended by respondent that appellant had gone to her parental home on her own free-will and accord, after taking all the jewellery and a sum of Rs.1000/- and

despite notice being sent, she has not returned to her matrimonial home. Thus, for all these reasons, she is not entitled to receive any amount of maintenance.

7. The Family Court was pleased to frame issues and parties went to trial. After considering the matter from all angles, the learned Judge of the Family Court partly allowed the appellant's application as under:

"(1) respondent shall pay Rs.2000/- per month as maintenance allowance to the petitioner from 26.4.2004, date of institution of petition to the date of divorce, i.e. 20.8.2004 and thereafter from 20.8.2004 to the period of iddat.

(2) respondent will bear cost of the suit of himself as well as of petitioner."

8. Thus, the claim of the appellant was allowed to the extent of Rs. 2,000/- per month towards maintenance from the date of institution of the petition till the date of divorce, i.e., 20.8.2004 and further from the said date till the expiry of iddat period but amount of maintenance thereafter was denied.

9. The appellant was, therefore, constrained to carry the matter further by filing Criminal Revision before the Gwalior Bench of the High Court of Madhya Pradesh. The said Criminal Revision came to be disposed of by learned Single Judge on 26.9.2008 and the order of the Family Court has substantially been upheld and consequently, the appellant's Revision has been dismissed. It is this order and the order passed by the Family Court which are the subject-matter of challenge in this appeal by grant of special leave.

10. At the outset, learned counsel for the appellant contended that learned Single Judge has gravely erred in dismissing the appellant's Revision on misconception of law on the ground that after divorce of a Muslim wife, a petition under Section 125 of the Cr.P.C. would not be maintainable. It was also contended that learned Single Judge proceeded on wrong assumption in dismissing appellant's Revision claiming maintenance under Section 125 of the Cr.P.C. It was also argued that both the courts below completely lost sight of the provisions of Section 7(1)(f) of the Family Courts Act, 1984 (hereinafter referred to as the 'Family Act').

11. On the other hand, Shri S.K. Dubey, learned Senior Counsel for the respondent contended that no illegality or perversity can be found in the order passed by the learned Single Judge and the same calls for no interference. It was also contended that the appeal being devoid of any merit and substance, deserves to be dismissed.

12. In the light of the aforesaid contentions, we have heard the learned counsel for the parties and perused the records.

13. The basic and foremost question that arises for consideration is whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband underSection 125 of the Cr.P.C. and, if yes, then through which forum.

14. Section 4 of Muslim Act reads as under:

"4. Order for payment of maintenance:

-(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order

directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

15. Section 5 thereof deals with the option to be governed by the provisions of Section 125 to 128of the Cr.P.C. It appears that parties had not given any joint or separate application for being considered by the Court. Section 7 thereof deals with transitional provisions.

16. Family Act, was enacted w.e.f. 14th September, 1984 with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.

17. The purpose of enactment was essentially to set up family courts for the settlement of family disputes, emphasizing on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes.

18. The Act, inter alia, seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C.

19. Section 7 appearing in Chapter III of the Family Act deals with Jurisdiction. Relevant provisions thereof read as under:

"7. Jurisdiction-(1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this sub- section are suits and proceedings of the following nature, namely:-

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) a suit or proceeding for maintenance;

(g) ...."

20. Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act. The said section reads as under :

"20. Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

21. Bare perusal of Section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue.

22. Thus, from the abovementioned provisions it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C.

23. In the light of the aforesaid contentions and in view of the pronouncement of judgments detailing the said issue, learned counsel for the appellant submits that matter stands finally settled but learned Single Judge wholly misconstrued the various provisions of the different Acts as mentioned hereinabove, thus, committed a grave error in rejecting the appellant's prayer.

24. In our opinion, the point stands settled by judgment of this Court reported in (2001) 7 SCC 740 titled Danial Latifi & Anr. Vs. Union of India pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced hereinunder :

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal

Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

32. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case [(1985) 2 SCC 556 Mohd. Ahmed Khan vs. Shah Bano Begum & Ors.]. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material - all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

25. Judgment of this Court reported in (2007) 6 SCC 785 titled Iqbal Bano Vs. State of U.P.& Anr. whereby the provisions contained in Section 125 of the Cr.P.C. have been aptly considered and the relevant portion of the order passed in Iqbal Bano's case reads as under:

"10. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same court. In Vijay Kumar Prasad Vs State of Bihar (2004) 5 SCC 196 it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows: (SCC p.200, Para 14).

14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings

under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126 (1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

26. In the light of the findings already recorded in earlier paras, it is not necessary for us to go into the merits. The point stands well settled which we would like to reiterate.

27. The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

28. Learned Single Judge appeared to be little confused with regard to different provisions ofMuslim Act, Family Act and Cr.P.C. and thus was wholly unjustified in rejecting the appellant's Revision.

29. Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi (supra) and Iqbal Bano (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

30. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry.

31. As a necessary consequence thereof, the matter is remanded to the Family Court at Gwalior for its disposal on merits at an early date, in accordance with law. The respondent shall bear the cost of litigation of the appellant. Counsel's fees Rs.5,000/-.

32. Consequently, the appeal stands allowed to the extent indicated above.

[B. SUDERSHAN REDDY]
[DEEPAK VERMA]

New Delhi.

December 04, 2009.

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KHATOON NISA VS STATE OF U.P. AND ORS.

(Before Hon'ble Mr. Justice G. Pattanaik, Hon'ble Mr. Justice M Shah, Hon'ble Mr. Justice D Raju, Hon'ble Mr. Justice S Variava & Hon'ble Mr. Justice D Dharmadhikari, JJ.)

2003 (1) AWC 128 SC, JT 2002 (7) SC 631, 2002 (6) SCALE 165

In Crl. A. Nos. 213-216/96 and 569/95

These appeals raise the question, as to whether a magistrate is entitled to invoke his jurisdiction under Section 125 of the Code of Criminal Procedure (Cr. P.C.) to grant maintenance in favour of divorced Muslim women.

Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act") as it was considered that the jurisdiction of the magistrate underSection 125 Cr. P.C. can be invoked only when the condition precedent mentioned in Section 5 of the Act are complied with, in the case in hand, the magistrate came to a finding that there has been no divorce in the eye of law and as such, the magistrate has the jurisdiction to grant maintenance under Section 125 of the Cr. P.C. This finding of the magistrate has been upheld by the High Court. The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr. P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr. P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr. P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case (supra) under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr. P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr. Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the magistrate. But he seriously disputes the findings of the magistrate on the status of the parties and contends that the magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law.

ORDER

1. These two appeals are directed against the judgment of a learned single judge of the Allahabad High Court, Lucknow bench, by grant of certificate from the said judgment. The two appeals are filed by the ceiling surplus tenure holder and his wife and one of the dispute was whether there has been a divorce between them as early as in the year 1969.

2. After coming into force of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as 'the Act') before the prescribed authority, the tenure holder took a stand that the land recorded in the name of his wife who has already been divorced since 1969 cannot be clubbed. The wife also took a similar stand. Section 3(7) of the Act defines the expression 'family'

in relation to a tenure holder to mean himself or herself and his wife or her husband as the case may be, (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters). Since the prescribed authority was required to determine the ceiling surplus in the hand of the tenure holder, one of the questions for consideration was whether in fact there has been a divorce between the tenure holder and his wife as claimed by them or it was merely a subterfuge to get over the rigours of the provisions of the Ceiling Act. On the basis of materials produced before it, the prescribed authority came to the conclusion that in fact there had been no divorce and the parties adopted divorce attempts for escaping the ceiling law. The said prescribed authority also came to the conclusion that there was no other document excepting the family register kept with the pradhan, where the wife and the husband have been entered separately. In fact the prescribed authority gave due weight to the family register which had been kept with the rural development officer who was the competent authority to issue the family register. Having come to the aforesaid conclusion, the prescribed authority concluded that the land standing in the name of Khatoon Nisa, wife of Rahmatullah, the tenure holder, has to be clubbed with the holding of the tenure holder, inasmuch as they come within the definition of the 'family' under Section 3 (7) of the Act.

3. Being aggrieved by the aforesaid order of the prescribed authority, both Sh. Rahmatullah and his wife, Smt. Khatoon Nisa, preferred appeals under Section 13 of the Act and the appellate authority affirmed the conclusion arrived at by the prescribed authority and came to the conclusion that there has been no error committed by the prescribed authority in treating the appellant being members of the same family for the purpose of the provisions of the Act. The two appeals thus having been dismissed, the matter was carried to the High Court under Article 226of the Constitution. The learned judge of the High Court, without being guided by the parameters for exercise of power under Article 226 against an order of an inferior tribunal, went on to examine the issue as to whether there can be a divorce under the Muslim law by uttering three times the word 'talaq' in one sitting and having elaborately delved into the same came to the conclusion that such 'talaq' is unconstitutional and cannot be sustained. Having thus came to the aforesaid conclusion, the court affirmed the conclusion of the prescribed authority under the Ceiling Act in the matter of determination of the surplus land in the hands of the tenure holder. The court having granted certificate against the judgment the appeals came to be filed.

4. Dr. Dhawan learned senior counsel appearing for the appellants, contended that the High Court while exercising its power of supervisory jurisdiction of a writ of certiorari is called upon to examine the correctness of the conclusion arrived at by the inferior tribunal and will be justified in interfering with those conclusions if the inferior tribunal either has admitted inadmissible evidence under consideration or has rejected any admissible piece of material or that the conclusion is such which cannot be said to be a reasonable one on the materials on record or that the finding is based on no evidence. These being the parameters for exercise of the power, the High Court should have limited its consideration only to the materials on which the prescribed authority and appellate authority under the Act came to the conclusion and the High Court was not called upon to examine the larger issue about the constitutionality and legality of a divorce made by a Muslim male by uttering talaq three times at one sitting. Dr. Dhawan also urged that the conclusion of the prescribed authority as well as that of the appellate authority cannot be sustained in law since the judgment is not based on the relevant materials. So far as the first submission of Dr. Dhawan is concerned, we find force in the same as in our opinion in the writ

petition filed by the tenure holder and his wife, it was not necessary for the court to examine a larger issue on the question of the constitutionality and validity of a divorce by a Muslim man by uttering 'talaq' thrice in one sitting. We, therefore, do not intend to delve into that question and in our opinion the aforesaid conclusion of the High Court was not required to be gone into in the case in hand and the said conclusion would not operate as law of the land until and unless the same arises in an appropriate case and decided accordingly. So far as the second contention of Dr. Dhawan is concerned we, however, do not agree with the same and after perusing the order of the prescribed authority as well as that of the appellate authority, we do not find any error of law much less any error apparent on the face of the order which required to be corrected by issuance of a writ of certio-rari. The materials on the basis of which the conclusion of the prescribed authority as well as that of the appellate authority was based cannot be said to be on irrelevant materials nor the ultimate conclusion can be said to be one without any evidence for the same. In that view of the matter the ultimate determination of the ceiling land in the hand of the surplus holder does not require any interference by the Court. These appeals are, therefore, disposed of accordingly.

5. All applications filed in these matters also stand disposed of.

6. This appeal stands disposed of in terms of our judgment delivered today in crl. appeal Nos. 213-216/1996.

7. This writ petition was filed as a counterblast to criminal appeals nos. 213-216/1996 which have already been disposed of by us today.

8. After going through the prayer of the writ petition and on examining the averments made in the writ petition, we find that there is no material on the basis of which the Court is in a position to grant any appropriate relief. This writ petition accordingly stands dismissed.

9. These appeals raise the question, as to whether a magistrate is entitled to invoke his jurisdiction under Section 125 of the Code of Criminal Procedure (Cr. P.C.) to grant maintenance in favour of divorced Muslim women.

10. Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act") as it was considered that the jurisdiction of the magistrate underSection 125 Cr. P.C. can be invoked only when the condition precedent mentioned in Section 5 of the Act are complied with, in the case in hand, the magistrate came to a finding that there has been no divorce in the eye of law and as such, the magistrate has the jurisdiction to grant maintenance under Section 125 of the Cr. P.C. This finding of the magistrate has been upheld by the High Court. The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr. P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr. P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr. P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case (supra) under the Act and since the parameters for exercise of that power are the same as those

contained in Section 125 Cr. P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr. Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the magistrate. But he seriously disputes the findings of the magistrate on the status of the parties and contends that the magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law.

11. In view of our aforesaid conclusion, it is not necessary for us to examine the correctness of the finding on the status of the parties, inasmuch as that finding was merely for the purpose of exercising jurisdiction under Section 125 Cr. P.C. and has no bearing at all in deciding the status of the parties.

12. These appeals stand disposed of accordingly.

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SMT. JASBIR KAUR SEHGAL VS THE DISTRICT JUDGE DEHRADUN & ORS

Smt. Jasbir Kaur Sehgal
Vs.
The District Judge Dehradun & Ors.

(Before Hon'ble Mrs. Justice Sujata V. Manohar & Hon'ble Mr. Justice D. P. Wadhwa, JJ.)

This is wife's appeal against the judgment dated October 14, 1996 of the High Court of Judicature at Allahabad. She is aggrieved by the impugned judgment under which she was awarded maintenance pendente lite under Section 24 of the Hindu Marriage Act, 1955 (for short `the Act') at the rate of Rs. 1500/- per month.

On an application filed by the wife in the trial court in proceeding for divorce initiated by her husband, respondent No.3 herein, she was awarded Rs. 2,500/- (Rupees two thousand and five hundred only) as expenses of litigation and maintenance pendente lite at the rate of Rs. 1000/- per month. Her revision before the District Judge Dehradun against this order was dismissed. She further filed writ petition under Article 227 of the Constitution of India in the High Court. By the impugned judgment the High Court enhanced the maintenance to Rs. 1500/- per month.

The question then arises as to from which date the wife would be entitled to claim the enhanced amount of maintenance pendente lite. If wife has no source of income it is the obligation of the husband to maintain her and also children of the marriage on the basis of the provision contained in the Hindu Adoption and Maintenance Act, 1956. Her right to claim maintenance fructifies on the date of the filing of the petition for divorce under the Act. Having thus fixed the date as the filing of the petition for divorce it is not always that the court has to grant the maintenance from that date.

The court has discretion in the matter as to from which date maintenance underSection 24 of the Act should be granted. The discretion of the court would depend upon multiple circumstance which are to be kept in view. These could be the time taken to serve the respondent in the petition the date of filing of the application under Section 241 of the Act; conduct of the parties in the proceedings; averments made in the application and the reply there to; the tendency of the wife to inflate the income out of all proportion and that of the husband to suppress the same; and the like. There has to be honesty of purpose for both the parties which unfortunately we find lacking in this case.

We are therefore of the opinion that ends of justice would be met if we direct that maintenance pendente lite as fixed by this judgment to be payable from the date of impugned order of the High Court which is October 16, 1996. We order accordingly. The impugned judgment of the High Court shall stand modified to that extent. All arrears of maintenance shall be paid within a period of two months from today and then regularly every month.

Present :

Hon'ble Mrs. Justice Sujata V. Manohar Hon'ble Mr. Justice D.P. Wadhwa Ms. Shalu Sharma, Rajesh K. Sharma, Rakesh K. Sharma, Advs., for the appellant.

P.P. Tripathi, Arvind Varma, Advs. for K.L. Mehta & Co., Advs. for the Respondents.

JUDGMENT

The following Judgment of the Court was delivered :

D.P. Wadhwa, J.

Leave granted.

This is wife's appeal against the judgment dated October 14, 1996 of the High Court of Judicature at Allahabad. She is aggrieved by the impugned judgment under which she was awarded maintenance pendente lite under Section 24 of the Hindu Marriage Act, 1955 (for short `the Act') at the rate of Rs. 1500/- per month. On an application filed by the wife in the trial court in proceeding for divorce initiated by her husband, respondent No.3 herein, she was awarded Rs. 2,500/- (Rupees two thousand and five hundred only) as expenses of litigation and maintenance pendente lite at the rate of Rs. 1000/- per month. Her revision before the District Judge Dehradun against this order was dismissed. She further filed writ petition under Article 227 of the Constitution of India in the High Court. By the impugned judgment the High Court enhanced the maintenance to Rs. 1500/- per month.

Respondent 1 and 2 in this appeal are respectively the District Judge, Dehradun and the Additional Civil Judge (IInd), Dehradun who are described as proforma respondents. It is not proper or even justified on the part of the appellant to implead the courts as respondents and respondents 1 and 2 are, therefore, struck off from the record of this appeal.

Parties were married on October 2, 1963. The husband at that time was an army officer. He retired and Lt. Colonel on August 10, 1986. On September 28, 1989 he filed the petition for divorce against his wife under Section 13 of the Act on the alleged grounds of cruelty and desertion. He stated that within two years of the marriage the wife started creating problem for him and she persisted in her behaviour right till the year 1989. In this span of 26 years in their married life, they have become the parents of four children, two sons and two daughters. Eldest daughter who is 34 years old and unmarried is living with her mother who maintains her. Second child is so who is working with Mukul Overseas Pvt. Ltd. on a monthly salary of Rs. 7500/- per month and is living in a house in Safdarjung Enclave in New Delhi. Third child is a daughter aged 26 years. She is also unmarried and unemployed and is living with the father. Fourth child is a son of 20 years of age, he is unemployed and had studied upto 11th class. Husband says that being head of the family he is to maintain two sons and a daughter as they are dependent on him. His claim is that he is presently having a meagre salary of Rs. 5000/- per month and is employed as consultant/adviser with M/s. Mukul International Private Limited. Both Mukul Overseas (P) Ltd. and Mukul International (P) Ltd. belong to same group.

After retirement from the army, respondent-husband joined the Oil and Natural Gas Commission (ONGC) as a Director and was posted at Dehradun. He retired from that post on August 21, 1995. Thereafter from January 1, 1996 husband is working with M/s. Mukul International Pvt. Ltd. as aforesaid. After deduction of income-tax at source, husband says he is getting an amount of Rs. 4700/- per month. Husband admits that he has a house in NOIDA which was on rent with the army and lease was terminated by letter dated January 29, 1996 from the Ministry of Defence. He says repairs are being carried on in the house and presently he is living with her eldest son in his house. He further says he is not getting any pension as on his permanent absorption in ONGC, he had opted to receive lumpsum amount in lieu of pension and prorata gratuity amount in lieu of pension and prorata gratuity amounting to Rs. 2,60,456/-. In addition the husband also received an amount of

Rs. 55,775/- on account of D.C.R. Gty. Husband has also filed his computation of taxable income for the assessment years 1992- 93, 1995-96 and 1996-97. He has though not filed any assessment order. Since he retired from ONGC in August, 1995 it would be appropriate to see his computation of taxable income for the year ending March 31, 1995. His gross salary income in Rs. 1,88,281/- and after deduction of House Rent Allowance it comes to Rs. 1,78,614. Income from house property he say is Rs. 22716/-, interest income is Rs. 3179/-. Total of these three items would be Rs. 2,04,509/-. Then there are claims of standard deduction, repairs in the house and tax rebate on saving amounting to Rs. 68,922/- which include payment on account of LIC, PF, PPF, MEP, NSC and general insurance. The amount of tax payable comes to Rs. 35716/- on a taxable income of Rs. 1,81,790/-. For the assessment year 1996-97 (year ending on March 31, 1996) the salary income shown is 1,18,151/-, income from house property is Rs. 18, 930/- and after standard deduction, and other deduction and the rebate the income tax payable is Rs. 18, 464/- on the net income of Rs. 1,31,200/-.

Wife says that the husband has not given true account of his assets and income and has rather suppressed the same. Though the wife has not been able to give any specific evidence to support her contention but circumstance show that the husband has not given true state of affairs of his income. He has pleaded that both his wife and his eldest daughter are earning Rs. 10,000/- per month but there is no basis for such an allegation. The fact remains that the wife has no source of income and she is also maintaining her eldest unmarried daughter. Under the Hindu Adoptions &Maintenance Act, 1956 it is the obligation of a person to maintain her unmarried daughter if she is unable to maintain herself. In this case since the wife has no income of her own, it is the obligation of the husband to maintain her and her two unmarried daughters one of whom is living with wife and one with him. Section 24 of the Act no doubt talks of maintenance of wife during the pendency of the proceedings but this section, in our view, cannot be read in isolation and cannot be given restricted meaning to hold that it is maintenance of the wife alone and no one else. Since wife is maintaining the eldest unmarried daughter, her right to claim maintenance would include her own maintenance and that of her daughter. This fact has to be kept in view while fixing the maintenance pendente lite for the wife. We are aware of the provisions of Section 26 of the Act providing for custody of minor children, their maintenance and education but that section operates in its own field.

Husband has filed this counter affidavit in the appeal before us and on our direction both the parties have filed additional affidavits. On one date when this appeal came up for hearing we were told that the husband had left that morning itself for Canada for further treatment after his bypass surgery in India and that his expenses visiting the Canada and as well as the expenses for the treatment there were being met by his friend. In his affidavit husband has stated that his friend Sontosh Singh for his treatment in Canada paid his fare. He is, however, silent about the expense if any met by Sontosh Singh for his treatment in Canada. A copy of the statutory declaration of Sontosh Singh which is dated March 21, 1997 has also been filed. In this Sontosh Singh does say that he has undertaken to bear the cost of passage and maintenance of respondent during his stay in Canada and North America. It is a matter of common knowledge that medical treatment in Canada is high and an ordinary person cannot afford the expenses which are met by taking medical insurance. As to what expenses husband incurred for his bypass surgery in India has not been disclosed. On our query as to how much foreign exchange husband obtained while going to Canada, it was stated that Dollar U.S. 1,350 were obtained at a cost of about Rs. 50,000/-. From where all these monies came from we are left in dark. Husband had not filed any certificate of his salary from his present employer though the wife has contended that both the firms Mukul Overseas Pvt. Ltd and Mukul International Pvt. Ltd. are owned by the

husband himself which fact husband had denied. Though we are not concerned with the income of his son which is stated to be Rs. 7,500/- per month, it would have been better if the husband had given complete details as to the perquisites enjoyed by his son, the rent he is paying for his rented accommodation at Safdarjung Enclave and the like. Claim of the husband that though his house in NOIDA fell vacant in January, 1996, it has neither been further let nor the husband himself living there because of certain repairs and on that account he is residing with his son does not appeal to us. It does appear to us from the affidavit of the husband that it conceals more than what it tells of his income and other assets. Attempt has been made to conceal his true income and that leads us to draw an adverse inference against the husband about his income that it is much more than what is being disclosed to us. The claim of the husband that from an income of Rs. 4,750/- per month which is getting from Mukul International Pvt. Ltd. he has to maintain himself, his two sons and daughter is absorb particularly when the eldest son is earning more than the husband and it is the husband who is living with him. Husband has also not disclosed retrial benefits if any from the ONGC and the amount of provident fund he obtained from there. Husband has interest income from Unit Trust of India and also from the fixed deposit receipt but again he has not disclosed the number of units he is holding and the amount of the fixed deposits in his name, from all these we have to hold that the annual income of the respondent-husband is even on modest estimate to be Rs. 2,40,000/- annually which would come to Rs. 20,000/- per month. Considering the diverse claims made by the parties one inflating the income and the other suppressing an element of conjecture and guess work does enter for arriving at the income of the husband. It cannot be done by any mathematical precision.

Wife has no fixed abode of residence She say she is living in Gurudwara with her eldest daughter for safety. On the other hand husband has sufficient income and a house to him. Wife has not claimed and litigation expenses in this appeal. She is aggrieved only because of the paltry amount of maintenance fixed by the court. No set formula can be laid for fixing the amount of maintenance. It has, in very nature of things, to depend on the facts and circumstance of each case. Some scope for liverage can, however, be always there. Court has to consider the status of the parties, their respective needs, capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and those; he is obliged under the law and statutory but involuntary payments or deductions. Amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate. In the circumstances of the present case we fix maintenance pendente lite at the rate of Rs. 5,000/- per month payable by respondent-husband to the appellant-wife.

The question then arises as to from which date the wife would be entitled to claim the enhanced amount of maintenance pendente lite. If wife has no source of income it is the obligation of the husband to maintain her and also children of the marriage on the basis of the provision contained in the Hindu Adoption and Maintenance Act, 1956. Her right to claim maintenance fructifies on the date of the filing of the petition for divorce under the Act. Having thus fixed the date as the filing of the petition for divorce it is not always that the court has to grant the maintenance from that date. The court has discretion in the matter as to from which date maintenance underSection 24 of the Act should be granted. The discretion of the court would depend upon multiple circumstance which are to be kept in view. These could be the time taken to serve the respondent in the petition the date of filing of the application under Section 241 of the Act; conduct of the parties in the proceedings; averments made in the application and the reply there to; the tendency of the wife to inflate the income out of

all proportion and that of the husband to suppress the same; and the like. There has to be honesty of purpose for both the parties which unfortunately we find lacking in this case. We are therefore of the opinion that ends of justice would be met if we direct that maintenance pendente lite as fixed by this judgment to be payable from the date of impugned order of the High Court which is October 16, 1996. We order accordingly. The impugned judgment of the High Court shall stand modified to that extent. All arrears of maintenance shall be paid within a period of two months from today and then regularly every month.

The appeal is allowed with costs. Counsel fee Rs. 2,500/-.

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CHATURBHUJ VS SITA BAI

Appeal (Crl.) 1627 of 2007 (Arising out of SLP (Crl.) No.4379 of 2006)
Date of Judgment: 27/11/2007

(2008) 2 SCC 316

Chaturbhuj
Vs.
Sita Bai

(Before Hon'ble Dr. Justice Arijit Pasayat & Hon'ble Mr. Justice Aftab Alam, JJ.)

The respondent had filed an application under Section 125 of Cr.P.C. claiming maintenance from the appellant. Trial Court directed to pay Rs.1500/- p.m.

Revision petition was filed by the present appellant was dismissed . The matter was further carried before the High Court by filing an application in terms of Section 482 Cr.P.C. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children.

The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves

The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In Bhagwan v. Kamla Devi (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

JUDGMENT

Dr. ARIJIT PASAYAT, J.—Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Indore Bench, dismissing the revision petition filed by the appellant in terms of Section 482 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.'). The challenge before the High Court was to the order passed by learned Judicial Magistrate, First Class, Neemuch,

M.P. as affirmed by the learned Additional Sessions Judge, Neemuch, M.P. The respondent had filed an application under Section 125 of Cr.P.C. claiming maintenance from the appellant. Undisputedly, the appellant and the respondent had entered into marital knot about four decades back and for more than two decades they were living separately. In the application it was claimed that she was unemployed and unable to maintain herself. Appellant had retired from the post of Assistant Director of Agriculture and was getting about Rs.8,000/- as pension and a similar amount as house rent. Besides this, he was lending money to people on interest. The appellant claimed Rs.10,000/- as maintenance. The stand of the appellant was that the applicant was living in the house constructed by the present appellant who had purchased 7 bighas of land in Ratlam in the name of the applicant. She let out the house on rent and since 1979 was residing with one of their sons. The applicant sold the agricultural land on 13.3.2003. The sale proceeds were still with the applicant. The appellant was getting pension of about Rs.5,700/- p.m. and was not getting any house rent regularly. He was getting 2-3 thousand rupees per month. The plea that the appellant had married another lady was denied. It was further submitted that the applicant at the relevant point of time was staying in the house of the appellant and electricity and water dues were being paid by him. The applicant can maintain herself from the money received from the sale of agricultural land and rent. Considering the evidence on record, the trial Court found that the applicant-respondent did not have sufficient means to maintain herself.

3. Revision petition was filed by the present appellant. Challenge was to the direction to pay Rs.1500/- p.m. by the trial Court. The stand was that the applicant was able to maintain herself from her income was reiterated. The revisional court analysed the evidence and held that the appellant's monthly income was more than Rs.10,000/- and the amount received as rent by the respondent-claimant was not sufficient to maintain herself. The revision was accordingly dismissed. The matter was further carried before the High Court by filing an application in terms of Section 482 Cr.P.C. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

4. Section 125 Cr.P.C. reads as follows:

"125. (1) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation .For the purposes of this Chapter,

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

["(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.";] (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any port of each month's allowance 4 [allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an 4 [allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

5. The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807) falls within constitutional sweep ofArticle 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when

they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat and Ors. (2005 (2) Supreme 503).

6. Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means.

7. But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It is has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent-wife was earning some income. That is not sufficient to rule out application of Section 125 Cr.P.C. It has to be established that with the amount she earned the respondent-wife was able to maintain herself.

8. In an illustrative case where wife was surviving by begging, would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In Bhagwan v. Kamla Devi (AIR 1975 SC 83) it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

9. In the instant case the trial Court, the Revisional Court and the High Court have analysed the evidence and held that the respondent wife was unable to maintain herself. The conclusions are essentially factual and they are not perverse. That being so there is no scope for interference in this appeal which is dismissed.

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SAVITABEN SOMABHAI BHATIYA VS STATE OF GUJARAT AND ORS

Appeal (crl.) 399 of 2005

(2005) 3 SCC 636

Savitaben Somabhai Bhatiya
Vs.
State of Gujarat and Ors.

Date of Judgment : 10/03/2005
(Before Hon'ble Dr. Justice Arijit Pasayat & Hon'ble Mr. Justice S.H. Kapadia, JJ.)

Scope and ambit of Section 125 of the Code of Criminal Procedure, 1973 (in short the 'Code').

The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause-the cause of the derelicts.

Legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'.

JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

A brief reference to the factual position would suffice because essentially the dispute has to be adjudicated with reference to scope and ambit of Section 125 of the Code of Criminal Procedure, 1973 (in short the 'Code').

The case at hand according to appellant is a classic example of the inadequacies of law in protecting a woman who unwittingly entered into relationships with a married man.

Factual position as projected by the appellant is as follows:-

Appellant claims that she was married to respondent No.2 some time in 1994 according to the customary rites and rituals of their caste. Though initially, the respondent No.2 treated her nicely, thereafter he started ill-treating her and she was subjected to mental and physical torture. On enquiry about the reason for such a sudden change in his behaviour, the appellant came to know that respondent No.2 had developed illicit relationship with a lady named Veenaben. During the period the appellant stayed with the respondent, she became pregnant and subsequently, a child was born. As respondent No.2 neglected the appellant and the child born, an application in terms of Section 125 of the Code was filed claiming maintenance. The application was filed before the learned Judicial Magistrate, First Class (hereinafter referred to as the 'JMFC') Himmatnagar. Respondent No.2 opposed the application

by filing written statements taking the stand that the appellant was not his legally married wife and the child (respondent No.3) was not his son. He also denied having developed illicit relationship with Veenaben. He claimed that actually she was married to him more than 22 years back and two children were born. Their son Hament had died in the road accident in July 1990. In the Claim Petition name of Veenaben was mentioned as the legal heir and in the Voters List, Ration Card and Provident Fund records, Veenaben was shown as the wife of respondent No.2. On 23.6.1998 learned JMFC allowed the Claim Petition and granted maintenance. A criminal revision was filed by respondent No.2 before learned Additional Sessions Judge, Sabaakatha, Dist. Himmatnagar, who by his order dated 26.11.1998 set aside the judgment dated 23.6.1998 as passed by the learned JMFC and remanded the matter to the trial Court for adjudication afresh after affording an opportunity to respondent No.2 to cross examine the witnesses of the appellant. By order dated 31.7.1999, learned JMFC after considering the matter afresh awarded maintenance to both the appellant and the child.

A Criminal Revision Application No.65/95 was filed by respondent No.2 against the order dated 31.7.1999. By order dated 12.7.2001, learned Additional District Judge, Sabarkatha dismissed the application. The respondent No.2 filed a Special Criminal Application No.568/2001 before the Gujarat High Court which by the impugned order held that the appellant was not legally wedded wife of respondent No.2. Reliance was placed on documents filed by respondent No.2 to conclude that before the alleged date of marriage between the appellant and respondent No.2, the latter was already married to Veenaben with reference to the documents produced. However, maintenance granted to the child (respondent No.3) was maintained and amount as awarded to him i.e. Rs.350/- was enhanced to Rs.500/-. A direction was also given to pay the enhanced amount from the date of order of the learned JMFC i.e. 31.7.1999.

In support of the appeal, learned counsel for the appellant submitted that the High Court has taken a too technical view in the matter. Strict proof about a valid marriage is not the sine qua non for getting maintenance under Section 125 of the Code. The documents produced by respondent No.2 to substantiate the plea of earlier marriage with Veenaben should not have been given primacy over the clinching evidence adduced by the appellant to show that she was unaware of the alleged marriage. Since respondent No.2 is guilty of fraud and mis-representation, the equity should not weigh in his favour. Law is intended to protect destitute and harassed woman and rigid interpretation given to the word 'wife' goes against the legislative intent. In any event, nothing has been shown by respondent No.2 to show that there is any customary bar for a second marriage. Customs outweigh enacted law. That being the position, the order passed by the learned JMFC should be restored. It was residually submitted that when the amount was claimed as maintenance there was statutory limitation prescribed at Rs.500/- which has been done away with by omitting the words of limitation so far as the amount is concerned by amendment in 2001 to the Cr.P.C. Therefore, taking into account the high cost of living the quantum of maintenance should be enhanced for the child.

In response, learned counsel for respondent No.2 submitted that law is fairly well settled regarding the definition of the expression 'wife' and there is no scope for giving an extended meaning to include a woman who is not legally married.

There may be substance in the plea of learned counsel for the appellant that law operates harshly against the woman who unwittingly gets into relationship with a married man and Section 125 of the Code does not give protection to such woman. This may be an inadequacy in law, which only the legislature can undo. But as the position in law stands presently there is no escape from the conclusion that the expression 'wife' as per Section 125 of the Code refers to only legally married wife.

The provision is enacted for social justice and specially to protect women and children as also old and infirm poor parents and falls within the constitutional sweep of Article 15(3) reinforced byArticle 39 of the Constitution of India, 1950 (in short the 'Constitution'). The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions are applicable and enforceable whatever may be personal law by which the persons concerned are governed. (See Nanak Chand v. Chandra Kishore (AIR 1970 SC 446). But the personal law of the parties is relevant for deciding the validity of the marriage and therefore cannot be altogether excluded from consideration. (See Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and Anr.(AIR 1988 SC 644) There is no inconsistency between Section 125 of the Code and the provisions in the Hindu Adoption and Maintenance Act, 1956 (in short the 'Adoption Act'). The scope of the two laws is different.

Section 125 of the Code at the point of time when the petition for maintenance was filed reads as follows:

"125(1)- If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause

(b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation:- For the purposes of this Chapter-

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority;

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

By the Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001) the words 'not exceeding five hundred rupees in the whole' have been omitted w.e.f. 24.9.2001.

In Dwarika Prasad Satpathy v. Bidyut Prava Dixit and Anr. (AIR 1999 SC 3348) it was held that the validity of the marriage for the purpose of summary proceedings under Section 125 of the Code is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 of Indian Penal Code, 1860 (in short the 'IPC'). If the claimant in proceedings under Section 125 succeeds in showing that she and the respondent have lived together as husband and wife, the Court has to presume that they are legally wedded spouses, and in such a situation one who denies the marital

status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe as to whether the said procedure was complete as per the Hindu rites, in the proceedings under Section 125 of the Code. It is to be noted that when the respondent does not dispute the paternity of the child and accepts the fact that marriage ceremony was performed though not legally perfect, it would hardly lie in his mouth to contend in proceedings under Section 125 of the Code that there was no valid marriage as essential rites were not performed at the time of said marriage. The provision under Section 125 cannot be utilized for defeating the rights conferred by the legislature on the destitute women, children or parents who are victims of social environment. The provision is a measure of social justice and as noted above specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution.

The sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause-the cause of the derelicts. (See Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors. (AIR 1978 SC 1807).

In Smt. Yamunabai's case (supra), it was held that expression 'wife' used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word 'wife' is not defined inthe Code except indicating in the Explanation to Section 125 its inclusive character so as to cover a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must therefore be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is therefore not entitled to the benefit of Section 125 of the Code or the Hindu Marriage Act, 1955 (in short the 'Marriage Act'). Marriage with person having living spouse is null and void and not voidable. However, the attempt to exclude altogether the personal law applicable to the parties from consideration is improper. Section 125 of the Code has been enacted in the interest of a wife and one who intends to take benefit under sub- section (1) (a) has to establish the necessary condition, namely, that she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the provision in Section 125 of the Code is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the Section is attracted or not cannot be answered except by reference to the appropriate law governing the parties.

But it does not further the case of the appellant in the instant case. Even if it is accepted as stated by learned counsel for the appellant that husband was treating her as his wife it is really inconsequential. It is the intention of the legislature which is relevant and not the attitude of the party.

In Smt. Yamunabai's case (supra) plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier marriage when she married him was held to be of no avail. The principle of estoppel cannot be pressed into service to defeat the provision of Section 125 of the Code.

It may be noted at this juncture that the legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected inSection 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'.

As noted by this Court in Vimala (K.) v. Veeraswamy (K.) (1991 (2) SCC 375) when a plea of subsisting marriage is raised by the respondent-husband it has to be satisfactorily proved by tendering evidence to substantiate that he was already married.

In the instant case the evidence on record has been found sufficient by the Courts below by recording findings of fact that earlier marriage of respondent was established.

In that view of the matter, the application so far as claim of maintenance of the wife is concerned stands dismissed.

That brings us to the other question relating to adequacy of the quantum of maintenance awarded to the child. It is not in dispute that when the Claim Petition was filed, Rs.500/- was claimed as maintenance as that was the maximum amount which could have been granted because of the un-amended Section 125. But presently, there is no such limitation in view of the amendment as referred to above.

Learned counsel for respondent No.2 submitted that there was no amendment made to the Claim Petition seeking enhancement. We find that this is a too technical plea. As a matter of fact,Section 127 of the Code permits increase in the quantum. The application for maintenance was filed on 1.9.1995. The order granting maintenance was passed by the learned JMFC on 31.7.1999. The High Court enhanced the quantum awarded to the child from Rs.350/- to Rs.500/- with effect from the order passed by learned JMFC. No dispute has been raised regarding enhancement and in fact there was a concession to the prayer for enhancement before the High Court as recorded in the impugned judgment. Considering the peculiar facts of the case, we feel that the amount of maintenance to the child can be enhanced to Rs.850/- with effect from today.

Learned counsel for the respondent No.2 has submitted that as a humanitarian gesture, the respondent No.2 agrees to pay a lump-sum amount to settle the dispute. In case the respondent No.2 pays a sum of rupees two lakhs only within a period of four months to the appellant, the same shall be in full and final settlement of the claim of respondent No.3 for maintenance. While fixing the quantum we have taken note of the likely return as interest in case it is invested in fixed deposit in a Nationalised Bank, and the likely increase in the quantum of maintenance till respondent No.3 attains majority. Till deposit is made, the quantum fixed by this order shall be paid. If the respondent No.2 wants to make lump-sum payment in terms of this order, the amount shall be paid by the Bank draft in the name of respondent No.3 with appellant as mother guardian. The amount shall be kept in a fixed deposit with monthly interest payment facility till respondent No.3 attains majority.

The appeal is accordingly disposed of.

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SAMAR GHOSH VERSUS JAYA GHOSH

DATE OF JUDGMENT: 26/03/2007

Appeal (Civil) 151 of 2004

PETITIONER: Samar Ghosh
Vs.
RESPONDENT: Jaya Ghosh

(Before Hon'ble Mr. Justice B.N. Agrawal, Hon'ble Mr. Justice P.P. Naolekar & Hon'ble Mr. Justice Dalveer Bhandari, JJ.)

Apex Court put down the law with regard to mental cruelty as grounds for divorce in matrimonial law. The significance of the nature of conduct constituting cruelty lies in the fact that the "fault" or "matrimonial offence" theory is followed in Indian matrimonial law. Irretrievable breakdown of marriage is not grounds for divorce according to statutory law, and divorce can only be granted by establishing that the erring spouse has committed an "offence" like adultery, cruelty or desertion.

JUDGMENT

Dalveer Bhandari, J.

This is yet another unfortunate matrimonial dispute which has shattered the twenty two year old matrimonial bond between the parties. The appellant and the respondent are senior officials of the Indian Administrative Service, for short 'IAS'. The appellant and the respondent were married on 13.12.1984 at Calcutta under the Special Marriage Act, 1954. The respondent was a divorcee and had a female child from her first marriage. The custody of the said child was given to her by the District Court of Patna where the respondent had obtained a decree of divorce against her first husband, Debashish Gupta, who was also an I.A.S. officer.

The appellant and the respondent knew each other since 1983. The respondent, when she was serving as the Deputy Secretary in the Department of Finance, Government of West Bengal, used to meet the appellant between November 1983 and June 1984. They cultivated close friendship which later developed into courtship. The respondent's first husband, Debashish Gupta filed a belated appeal against the decree of divorce obtained by her from the District Court of Patna. Therefore, during the pendency of the appeal, she literally persuaded the appellant to agree to the marriage immediately so that the appeal of Debashish Gupta may become infructuous. The marriage between the parties was solemnized on 13.12.1984. According to the appellant, soon after the marriage, the respondent asked the appellant not to interfere with her career. She had also unilaterally declared her decision not to give birth to a child for two years and the appellant should not be inquisitive about her child and he should try to keep himself aloof from her as far as possible. According to the appellant, there was imposition of rationing in emotions in the arena of love, affection, future planning and normal human relations though he tried hard to reconcile himself to the situation created by the respondent.